

Decision Notice 029/2021

Minute of meeting between the First Minister of Scotland and Michel Barnier

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202000426



Scottish Information
Commissioner

Summary

The Ministers were asked for the minute of a meeting held between Michel Barnier and the First Minister of Scotland, Nicola Sturgeon, on 10 February 2020. The Ministers partially disclosed the information, but argued that disclosure of the remainder would, or would be likely to, prejudice substantially relations between the UK and the European Commission and would be likely to inhibit the free and frank exchange of views.

The Commissioner investigated and found that the Ministers were entitled to withhold the information, but was not satisfied that the exemption in section 32(1)(a)(ii) of FOISA was applicable to the information withheld in this case.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b)(ii) (Prejudice to effective conduct of public affairs); 32(1)(a)(ii) and (3) (definition of “international organisation”) (International relations)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 February 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was the full minutes of the meeting held by Michel Barnier with the First Minister of Scotland, Nicola Sturgeon, on Monday 10 February 2020.
2. The Ministers responded on 11 March 2020. They disclosed some information to the Applicant, but relied on the exemptions in sections 32(1)(a)(ii) (International relations) and 38(1)(b) (Personal information) of FOISA for withholding the rest. The Ministers did not explain why these exemptions applied, or set out their consideration, where relevant, of the public interest test in section 2(1)(b) of FOISA.
3. On 11 March 2020, the Applicant wrote to the Ministers, requesting a review of their decision as he believed disclosure of the withheld information would not prejudice relations between the UK and any international organisation (since, he submitted, the First Minister of Scotland does not represent, or speak for, or have a mandate to act for the UK).
4. The Ministers notified the Applicant of the outcome of their review on 31 March 2020, upholding their original decision, with modifications.
5. The Ministers concluded that their application of the exemption in section 32(1)(a)(ii) was correct, but determined that they should have informed the Applicant that they were withholding “nine short paragraphs”. They advised that, whilst the First Minister was not acting on behalf of the UK and the UK Government remained the negotiating party, the negotiations between the UK and EU were ongoing, highly sensitive and pertinent to the interests of the people of Scotland. The Ministers explained why they considered the public interest to favour maintaining the exemption in this case.
6. The Ministers also explained that they were relying on the exemption in section 30(b)(ii) for the withheld information, as they were of the view that disclosing the content of discussions between the First Minister and M. Barnier on the Scottish Government’s position on the

future of relationship negotiations would substantially inhibit such discussions in future. The Ministers also detailed why they considered the public interest to favour maintaining the exemption in section 30(b)(ii) in this case. (It is clear, from the Ministers' response, that they were no longer relying on the exemption in section 38(1)(b).)

7. On 7 April 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because it did not appear to him that it addressed the substantial issue (that is, that the Ministers assumed erroneously that exemption provisions in FOISA relevant to the UK Government's international relations applied to the devolved administration of Scotland).

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
9. On 9 July 2020, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions, focusing on their application of the exemptions in sections 30(b)(ii) and 32(1)(a)(ii) of FOISA (including consideration of the public interest test).
11. Further submissions were sought and received from the Ministers during the investigation.
12. Submissions were also received from the Applicant during the investigation as to why he considered the public interest lay in disclosure of the withheld information.

Commissioner's analysis and findings

13. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Section 32(1)(a)(ii) – International relations

14. The Ministers have relied on the exemption in section 32(1)(a)(ii) of FOISA for withholding the information contained in part of one paragraph and all of the other nine paragraphs of the minute of the meeting in question. Section 32(1)(a)(ii) states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between the United Kingdom and any international organisation.
15. In this case, the Ministers submitted that disclosure of the withheld information would substantially prejudice relations between the UK (including Scotland) and the European Commission Taskforce (acting on behalf of all of the EU Countries in negotiating the terms for Brexit with the UK Government).

16. For the purposes of this exemption, the Commissioner accepts that the European Commission (as part of the European Union) is an international organisation, in line with the definition in section 32(3) (reproduced in Appendix 1 below).
17. For the exemption in section 32(1)(a)(ii) to apply, the harm caused or likely to be caused by disclosure requires to be at the level of substantial prejudice: it must be of real and demonstrable significance. For the substantial prejudice to be “likely”, the Commissioner takes the view that there must be a significant possibility that it will occur, in the near (certainly the foreseeable) future.
18. In his briefing on section 32¹ of FOISA, the Commissioner notes that “when considering the exemptions in section 32(1)(a), it is important to remember that it is the international relations or interests of the UK which must be at risk of substantial prejudice from the disclosure of the information – substantial prejudice to a component region or part of the UK would not necessarily meet the test.”
19. The briefing goes on to say that, even if a negative reaction is anticipated from the disclosure of the information, an assessment will have to be made as to whether this reaction would, or would be likely to, prejudice substantially international relations. There may be circumstances where the disclosure of information may cause diplomatic annoyance or irritation, but would not necessarily result in serious prejudice to relations.
20. The timing of disclosure may also be an issue, and the risk of substantial prejudice may well diminish as time passes. However, the Commissioner must, at the latest, consider the position when the Ministers carried out the review (March 2020).

The Ministers’ submissions

21. The Ministers explained that the meeting between the First Minister and the EU Chief Negotiator on 10 February 2020 provided an opportunity for the First Minister to set out the Scottish Government’s position on the EU-UK future relationship negotiations and for M. Barnier to describe the EU’s approach to the negotiations and identify some of the main issues.
22. In their submissions, the Ministers noted that, whilst it is the UK Government that is the negotiating partner during negotiations with the European Commission on the EU-UK future relationship, Scottish Ministers have a valid reason to engage with the UK Government and the European Commission Taskforce in a candid manner, to ensure that they are kept fully informed of the potential impact of the negotiations on the people of Scotland and to enable them to promote and seek to protect Scotland’s interests in regard to the negotiations.
23. The Ministers commented that the EU-UK future relationship negotiations were ongoing, highly sensitive and pertinent to the interests of the people of the UK, including those living in Scotland.
24. The Ministers submitted that the First Minister and M. Barnier agreed that discussions concerning the EU-UK negotiations and Scotland’s devolved interests were held explicitly on the basis that they would be treated as confidential and there was no expectation that the substance of these discussions would subsequently be disclosed into the public domain.
25. The Ministers argued that, as foreign relations are reserved to the UK Government, they considered UK interests were as directly involved as any distinctly Scottish interests. The

¹ <https://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.aspx>

Ministers considered these interests to be inextricably linked and commented that there would be no expectation of release of this information into the public domain, as details of this meeting were prepared purely for internal circulation. Because of this and the explicit duty of confidence attached to the discussion at the meeting, the Ministers stated that they feel strongly that release of the summary of this meeting would substantially prejudice UK relations with the European Commission and, more broadly, EU member states.

26. The Ministers acknowledged that the Scottish Government and the First Minister had no formal role in the EU-UK future relationship negotiations, these being conducted between the UK Government and the European Commission on behalf of EU member states.
27. However, the Ministers explained that they had engaged with the UK Government on EU-UK negotiations, including through the Joint Ministerial Committee for European Negotiations (JMC (EN)), which had a remit to agree a UK approach to EU-UK negotiations.
28. The Ministers commented that disclosure of the withheld information would be likely to undermine the trust between the European Commission and the UK at a time when highly sensitive EU-UK future relationship negotiations were ongoing. The Ministers considered this detriment likely to happen immediately if the withheld information was disclosed, given the critical stage of negotiations. The Ministers also believed this breakdown in trust could lead to Scotland's interests not being sufficiently represented during the final stages of the EU-UK negotiations, and that the flow of information relating to Scotland's interests would be reduced.

The Applicant's submissions

29. As mentioned previously, the Applicant does not agree that the provisions of this exemption apply to the devolved administration in Scotland.

The Commissioner's views on section 32(1)(a)(ii)

30. Having considered the withheld information and submissions from the Ministers, together with the Devolution Memorandum of Understanding and Supplementary Agreements that exists between the UK Government and the Devolved Administrations, it is clear to the Commissioner that international relations and relations with the EU are reserved matters, which remain the responsibility of the UK Government and UK Parliament.
31. Whilst there have obviously been discussions between the First Minister of Scotland and M. Barnier, these relate to the First Minister's view and opinion on the EU relationship negotiations from a Scottish perspective and do not represent the views of the UK as a whole (although the Commissioner does accept that the matters under discussion do impinge on the UK Government and reserved matters).
32. The Commissioner appreciates that the First Minister will wish to ensure that the views of the Scottish Ministers are recognised and considered in negotiations, but that appears to come within the role and remit of the JMC, as set out in the Memorandum of Understanding and Supplementary Agreements.
33. The Commissioner therefore finds it difficult to accept that, if the withheld information were to be disclosed, there would be the required potential for the substantial prejudice envisaged by the Ministers to the relationship between the UK Government and the European Commission. This is particularly the case as it is apparent that any comments made by the First Minister relate to the Scottish Ministers' view and not the UK's.

34. The Commissioner understands that any UK views would be expressed by the Prime Minister, Foreign Secretary, Chief Negotiator or a member of the JMC authorised to act on behalf of the UK in talks with the European Commission. Furthermore, information in the media and public domain shows that the European Commission, and M. Barnier specifically, have been very clear that they will only negotiate with the UK Government where Brexit and future relations with the EU were concerned. Given the clear negotiating relationships, there would not appear to be scope for these separate discussions impinging on future negotiation.
35. Overall, the Commissioner does not agree that disclosure would, or would be likely to, prejudice substantially relations between the UK and the European Commission. For the reasons set out above, the Commissioner does not uphold the Ministers' reliance on the exemption in section 32(1)(a)(ii) of FOISA in respect of this information.
36. As the Commissioner is not satisfied that the exemption in section 32(1)(a)(ii) is applicable to the information, he is not required – in relation to this exemption – to go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Section 30(b)(ii) – Prejudice to the effective conduct of public affairs

37. The Ministers also relied on the exemption in section 30(b)(ii) for withholding the information in part of 1 paragraph and all of the other nine paragraphs of the minute of the meeting.
38. Section 30(b)(ii) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
39. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.
40. Each request must be considered on a case-by-case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure should have any bearing. Again, it is important to note that the Commissioner must, at the latest, consider the position when the Ministers carried out the review (March 2020).
41. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

The Ministers' submissions

42. In the Ministers' view, disclosure would be likely to inhibit future candid and robust discussions between the Scottish Government and the European Commission in relation to Scotland's interest in the EU-UK negotiations and would limit Scotland's ability to shape the course of negotiations both with the EU and UK government. The Ministers considered that disclosure would substantially prejudice relations between the UK and its constituent parts during the ongoing EU-UK negotiations, which would not be in the best interests of Scotland either now or in the future.

43. The Ministers again commented that the discussion covered by the withheld information was undertaken explicitly on the understanding that it would be treated as confidential, and there was no expectation that the information would be disclosed into the public domain. The Ministers felt strongly that release of communications considering the UK position in relation to highly sensitive negotiations would have a substantial chilling effect on any future discussion of this nature. The Ministers considered disclosure of the content of the discussion in this case would result in the EU being less likely to discuss the potential impact of the EU-UK future relationship negotiations on the people of Scotland, directly with Scotland. This would, in turn, impact substantially on the Scottish Government's ability to protect Scotland's interests throughout the negotiations.
44. The Ministers noted that the meeting to which the minute related took place at a time when negotiations were at a critical stage during the transition period. As the Brexit negotiations had yet to be concluded, the Ministers assert that it was critically important to protect the private space within which Ministers and senior officials from all parties (the European Commission Task Force, the Scottish Government and the UK Government) could discuss various aspects of the EU-UK future relationship without fear that their views would be disclosed publicly.
45. As further views would be sought and scrutinised as the negotiations continued, the Ministers submitted that disclosure of the requested information in response to the request would lead to officials being more guarded in future, which would, in turn have a chilling effect on the views and comments they were prepared to disclose. The Ministers argued that concern over the effect of releasing this advice might lead officials to understate or set aside legitimate and important concerns about the negotiations in Scotland, which would impact the overall effectiveness of the negotiations.

The Commissioner's views on section 30(b)(ii)

46. The Commissioner has considered all of the submissions made by the Ministers and the Applicant, along with the withheld information under consideration. The Commissioner notes that there was an explicit duty of confidentiality in place between the parties involved in the meeting, to the effect that the content of the minute would not be shared publicly. (While this does not mean that the information should automatically be treated as exempt under section 30(b)(ii), it is a factor to consider.)
47. The Commissioner also accepts, in all the circumstances of this particular case, that officials involved in the discussion required a private space to discuss matters freely and frankly, without concern that such comments would be made public.
48. Whilst the Commissioner recognises that the Scottish First Minister has no legal authority to negotiate directly with the EC on the UK's behalf, it is clear that Scotland, like the other devolved administrations, has a role to play in representing its own interests during discussions with the UK Government through the JMCs. This role allows the devolved administrations to influence the UK's negotiating position with the European Commission over Brexit.
49. The Commissioner is satisfied that disclosure (at the time of the Applicant's request or review) of the views expressed in the meeting minute would have substantially inhibited the Scottish Ministers' ability to fully participate in, and shape, future discussions and negotiations with the UK Government through these JMCs. This would clearly have had a negative impact on the ability of the Ministers to ensure that their views were represented and supported in the best way possible during the ongoing Brexit negotiations.

50. In all the circumstances of the case, the Commissioner accepts that disclosure of the withheld information would, or have been likely to, result in substantial inhibition to the free and frank exchange of views for the purposes of deliberation, as argued by the Ministers. As such, he is satisfied that the information under consideration here was exempt from disclosure in terms of section 30(b)(ii) of FOISA. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA.

Public interest test

51. The “public interest” is not defined in FOISA, but has been described as “something which is of serious concern and benefit to the public”, not merely something of individual interest. The public interest does not mean “of interest to the public” but “in the interest of the public”, i.e. disclosure must serve the interests of the public.

The Ministers’ view on the public interest

52. The Ministers recognised a public interest in any discussions between the First Minister and M. Barnier on the Scottish Government’s position on the future of relationship negotiations between the UK and the EU. However, the Ministers considered this to be outweighed by the strong public interest in maintaining the integrity of the process of setting down the exchange of free and frank views and opinions, and in allowing Ministers and officials a private space within which to communicate with appropriate external stakeholders as part of the process of exploring and refining the Government’s position on Scotland’s relationship with the EU, thereby protecting the private space in which views of a free and frank nature could be exchanged.
53. The Ministers explained that they were fully committed to the Open Government in Scotland Action Plan 2018-2020, including commitment number 5, relating to transparency and involvement as the UK leaves the European Union. Specifically, the Ministers commented that they had done everything that they could to engage and inform Scottish citizens, businesses and stakeholder organisations about Brexit, the EU-UK negotiations and the impacts on Scotland of the UK’s decision to leave the EU. The Scottish Ministers highlighted the range of information they have made available via their website, covering government research, statements made by Ministers to the Scottish Parliament and elsewhere, guidance for Scottish stakeholders and businesses that will be affected by Brexit following the end of the transition period, and analysis and reports.
54. The Ministers acknowledged some public interest in the Scottish Government’s discussions with the European Commission in relation to the EU-UK negotiations. They also recognised a public interest in disclosing information as part of an open, transparent and accountable government. However, they considered release of a small amount of information falling within scope of the Applicant’s request demonstrated their recognition of this public interest.
55. The Ministers considered there to be a greater public interest in ensuring that the Scottish and UK Governments were able to maintain good relations with the European Commission, in order to protect the UK’s ability to negotiate a deal with the EU and the Scottish Government’s ability to engage to protect Scotland’s interests. The Ministers could see no public interest in jeopardising those relations as a consequence of disclosure of sensitive information, discussed in confidence.
56. The Ministers concluded that the public interest lay in maintaining good relations, based on trust and respect, between the European Commission and the individual nations making up the UK, especially given the critical phase of negotiations and the significant impact that a deal or no-deal outcome could have on the citizens of Scotland and the UK.

The Applicant's view on the public interest

57. The Applicant argued that knowledge of the minuted discussions between the Scottish First Minister and M. Barnier would enhance public understanding of the Scottish government's actual policy proposals in relation to the EU.
58. He was also of the view that disclosure would promote accountability and transparency of any undertakings the Scottish Government might be willing to give, or might have given, the EU and vice versa.
59. The Applicant considered disclosure of this information to be of particular importance to EU citizens living in Scotland, in order to enable them to understand decisions and undertakings that might affect their lives.

The Commissioner's conclusions on the public interest

60. The Commissioner has considered the public interest test arguments put forward by both the Ministers and the Applicant. The Commissioner recognises the substantial public interest that exists in the matter of the UK's future relationship with the EU following Brexit, and also in the negotiations around the mechanics of Brexit and in reaching an acceptable agreement which takes account of the needs and sensitivities of all parties involved.
61. The Commissioner also accepts that disclosure of the information in the minute would promote accountability and transparency in relation to any undertakings the Scottish Government may be willing to give, or may have given, to the EU and vice versa. However, the Commissioner does not agree that disclosure of the information would assist EU citizens who are resident in the UK in better understanding decisions or undertakings that may affect their lives.
62. When deciding whether it is in the public interest to disclose advice and/or views, this must be assessed in relation to the specific circumstances of the case on each occasion, and at the time of the review (at the latest). In this case, on balance, the Commissioner accepts that there is a greater public interest in ensuring that discussions with other stakeholders, such as the UK government or the European Commission, can be made fully and frankly, in circumstances where both parties have confidence that the content of these would not be disclosed, particularly regarding matters of sensitivity, whilst negotiations are ongoing.
63. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information was outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA. Consequently, he is satisfied that the Ministers were correct in withholding the information under this exemption.

Decision

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

The Commissioner finds that, by relying on the exemption in section 30(b)(ii) of FOISA for withholding information in the Minute from the Applicant, the Ministers complied with Part 1.

However, the Commissioner is not satisfied that the exemption in section 32(1)(a)(ii) of FOISA was applicable to the information withheld in this case.

Given that he has concluded that the Ministers were entitled to rely on the exemption in section 30(b)(ii) of FOISA for withholding the requested information, the Commissioner does not require them to take any action in respect of their reliance on section 32(1)(a)(ii), in response to the Applicant's application.

Appeal

Should either the Applicant or the Ministers 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.

Daren Fitzhenry
Scottish Information Commissioner

10 March 2021

Appendix 1: 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.

...

- (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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

...

- (ii) the free and frank exchange of views for the purposes of deliberation; or

...

32 International relations

- (1) Information is exempt information if-

- (a) its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (ii) relations between the United Kingdom and any international organisation or international court;

...

- (3) In subsection (1)-

...

“international organisation” means –

- (a) an international organisation whose members include any two or more States; or

(b) an organ of such an international organisation;

...

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