

Decision Notice



Decision 040/2014 Mr Alisdair MacPherson and the Scottish Ministers

Legal advice: membership of international organisations

Reference No: 201302023

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Summary

On 18 July 2012, Mr MacPherson asked the Scottish Ministers (the Ministers) for legal advice sought by the Scottish Government regarding Scotland's membership of international organisations should Scotland become an independent state (not including the European Union or its predecessors).

Initially, the Ministers responded by applying section 18 of FOISA (i.e. refusing to confirm or deny whether relevant information existed or was held). Following a review, the Ministers confirmed that they held information falling within the scope of Mr MacPherson's request, but withheld it on the basis that it was subject to legal professional privilege, under section 36(1) of FOISA.

Following an investigation, the Commissioner found the Ministers were entitled (at the time of their review) to withhold the information under section 36(1). The Commissioner also found that the Ministers had failed to respond to Mr MacPherson's request for review within the required timescale.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 21(1) (Review by Scottish public authority); 36(1) (Confidentiality)

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 18 July 2012, Mr MacPherson wrote to the Ministers, asking them to confirm whether legal advice had been sought by the Scottish Government regarding Scotland's membership of the United Nations, International Monetary Fund, NATO and any other international organisations (not including the European Union or its predecessors) were Scotland to become an independent state. If such advice had been sought, he asked for details of the content of the advice, or information as to where it was publicly available.
2. The Ministers responded on 13 August 2012, refusing the request in terms of section 18(1) of FOISA: they considered it would be contrary to the public interest to reveal whether the information requested by Mr MacPherson existed or was held by the Scottish Government. If



the information requested did exist and was held, the Ministers considered it would be exempt under sections 29(1)(a) or 30(c) of FOISA.

3. On 18 September 2012, Mr MacPherson wrote to the Ministers requesting a review of their decision. In his view, to know whether such information existed, and the content of the information if it did, was of paramount importance to the public in advance of the [then] forthcoming independence referendum.
4. The Ministers notified Mr MacPherson of the outcome of their review on 22 March 2013. They confirmed that they held information falling within the scope of the request and withheld it under section 36(1) of FOISA. They stated that the information was legal advice and considered disclosure would breach legal professional privilege.
5. On 29 August 2013, Mr MacPherson wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' 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 MacPherson made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 4 September 2013, the Ministers were notified in writing that an application had been received from Mr MacPherson and asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, 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 justify their application of section 36(1) of FOISA and to explain the time taken to respond to Mr MacPherson's requirement for review.

Commissioner's analysis and findings

9. 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 her by both Mr MacPherson and the Ministers. She is satisfied that no matter of relevance has been overlooked.



10. Mr MacPherson indicated he was dissatisfied that section 18 had been initially applied to his request. As the Ministers overturned this on review, this is not a matter the Commissioner can consider in this decision. The Commissioner will not, therefore, consider that aspect of the request further in this decision, but she notes that, in responding to Mr MacPherson's requirement for review, the Ministers confirmed whether legal advice had been sought on the matters referred to in his request.
11. Mr MacPherson was also dissatisfied that the information had been withheld on review. He challenged the Ministers' assertion, as he perceived it, that this was advice received in anticipation of legal proceedings or was otherwise information which would be kept confidential within the context of legal proceedings. In the context of the forthcoming referendum, he believed the public interest favoured disclosure.
12. It should be noted that the Commissioner must take into account the circumstances that prevailed at the time the Ministers reviewed Mr MacPherson's request, i.e. 22 March 2013.

Information held by the Ministers

13. The Ministers were asked to provide the Commissioner with details of searches or other enquiries carried out to identify and locate any relevant information they held.
14. The Ministers explained that the subject of Mr MacPherson's request was an area they were only just starting to look at for the purposes of policy development, when he submitted the request. They explained plans for the referendum were only then becoming clearer. In the circumstances, they did not believe there was any basis for expecting there to be any historic information on file. In addition, they pointed out that legal advice on this and other similar constitutional issues was the responsibility of just one Division within the Scottish Government Legal Directorate (SGLD), so no other part of SGLD would have provided legal advice on the subject.
15. The Ministers stated that the relevant policy and legal leads were involved in handling the request and were aware of what advice had been given and where it was located, so they did not consider it necessary to do a government-wide search. They submitted that SGLD was therefore able to locate all the relevant information easily. Only the three documents identified as within the scope, or partly within the scope, of the request pre-dated Mr MacPherson's request.
16. The Ministers supplied the Commissioner with the information in these three documents. They also supplied other information which they submitted did not fall within the terms of the request, as it was not legal advice. It was provided to demonstrate the context within which the legal advice was given.
17. The Commissioner has considered the information supplied by the Ministers together with the relevant submissions. She is satisfied that they interpreted Mr MacPherson's request reasonably and accepts their conclusions on the information they considered to fall within (and outwith) the scope of the request.



18. In the particular circumstances of this case, having considered the relevant submissions, the Commissioner is also satisfied that the Ministers took adequate, proportionate steps to establish what information they held and which fell within the scope of the request. She might require more extensive searches in other circumstances, but here she considers the nature of the information and the context to be of particular relevance. This is advice on a reserved matter. The Commissioner accepts as reasonable that legal advice was not held outwith the context of the current debate on independence. She also accepts that policy development in this area was at a relatively early stage at the time the request was received, and that the Ministers would not be expected to hold a substantial amount of information at the time.
19. The Commissioner will now consider whether the Ministers complied with Part 1 of FOISA in withholding the information under section 36(1) of FOISA.

Section 36(1) of FOISA - Confidentiality

20. 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. Among the types of communication which fall into this category are those covered by legal advice privilege, which covers communications between lawyer and client in which legal advice is sought or given.
21. The Ministers stated that they were relying on the section 36(1) exemption in this case because legal advice privilege applied to the withheld information.
22. For legal advice privilege to apply, certain conditions must be fulfilled.
 - (i) The communication must be with a professional legal adviser, such as a solicitor or advocate.
 - (ii) The legal adviser must be acting in their professional capacity as such, and the communication must occur in the context of their professional relationship with their client.
 - (iii) The information must be confidential between lawyer and client.
23. The Ministers explained that each of the three documents considered within the scope of the request constituted legal advice provided by two different solicitors within SGLD. The advice was provided in a legal context as part of each solicitor's role as a legal adviser (rather than in a non-legal role, such as that of a line manager). Therefore, in the Ministers' view, the information was all subject to legal professional privilege.
24. Having considered the Ministers' submissions and the withheld information, the Commissioner is satisfied that all of the conditions in paragraph 22 (above) apply to the information. As a result, she accepts that the information is (and was, at the material time, when the Ministers responded to Mr MacPherson's requirement for review) exempt from disclosure under section 36(1) of FOISA.



Public interest test

25. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b). This means that, even where the exemption applies, the information must be disclosed if, in all the circumstances of the case, the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
26. The courts recognise that there is a strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds (see, for example, *Three Rivers District Council and others v Governor and Company of the Bank of England 2004 UKHL 48*¹). The Commissioner will generally apply the same reasoning to all communications attracting legal professional privilege
27. The Commissioner has considered all of the submissions put to her regarding the public interest in this case. As noted above, in considering the authority's compliance with Part 1 of FOISA she must consider the position at the time of the authority's response to the applicant's requirement for review (see paragraph 31 of the opinion of the Lord President in *The Scottish Ministers v The Scottish Information Commissioner [2006] CSIH 8*)².
28. Mr MacPherson submitted that it was wholly within the public interest for such information to be provided for the purpose of open and informed debate in advance of a "major and unprecedented decision regarding Scotland's future". He believed this significantly outweighed confidentiality of communications, arguing that the information would allow members of the public to be fully informed when deciding whether to support or reject independence. He contended that "the exceptional nature of these present circumstances are sufficient to render this a highly compelling case", such as would require the disclosure of privileged communications
29. Mr MacPherson also cited assertions in the published White Paper on independence, *Scotland's Future*, relating to and independent Scotland's membership of various international organisations. He believed the public were entitled to know whether these were "grounded in reality". The Commissioner must note that the White Paper was published in November 2013, well after the Ministers responded to Mr MacPherson's requirement for review.
30. The Ministers acknowledged a public interest in the release of legal advice on membership of international organisations, in order to promote openness and inform the debate on this issue in advance of the referendum. However, the Ministers commented that the information was prepared while work on these issues was still at an early stage. Therefore, they do not contain detailed legal advice of the type that would be likely significantly to inform people about the process for joining international organisations in the event of a vote for independence.
31. The Ministers referred to the (then) forthcoming White Paper, which they believed would better satisfy the public interest in ensuring people were sufficiently informed in advance of the referendum.

¹ <http://www.publications.parliament.uk/pa/ld200304/ldjudgmt/jd041111/riv-1.htm>

² <http://www.scotcourts.gov.uk/opinions/2007CSIH08.html>



32. The Ministers went on to identify a very strong public interest in maintaining legal professional privilege, to ensure the confidentiality of communications. They considered it important that lawyers could feel able to provide free and frank legal advice to their clients without fear that it would be divulged publicly, and conversely that the Scottish Government could feel able to seek the best possible legal advice.
33. The Ministers concluded that the strong public interest in protecting the confidentiality of the withheld information outweighed any public interest in disclosure.
34. In determining where the balance of the public interest lies in relation to section 36(1), the Commissioner must take into account the significant weight to be attached that the public interest in maintaining the exemption. There will be occasions where this significant public interest may be outweighed by the public interest in disclosing the information, for example, disclosure may be appropriate where:
 - the requirement for disclosure is overwhelming
 - the privileged material discloses wrongdoing by/within an authority
 - the material discloses a misrepresentation to the public of advice received
 - the material disclosed 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.
35. The Commissioner is satisfied that none of these considerations apply in the circumstances of this particular case.
36. In this case, the Commissioner recognises that the outcome of the forthcoming referendum will potentially effect a momentous change in Scotland's constitutional position. In her view, it is essential that the electorate should be able to make an informed decision when making their choice in that referendum.
37. On the other hand the Commissioner recognizes the very strong public interest in maintaining confidentiality of communications. As indicated above, she must also consider the position at the time of the outcome of the Ministers' review, not (for example) at the later time when the White Paper was published. She must also consider the content of the withheld information, which she does not consider would, in this case, add significantly to public debate on the issues.
38. In this instance the Commissioner is not satisfied that the public interest in disclosure of the information in question is sufficiently compelling to outweigh the strong public interest in maintaining confidentiality of communications. In all the circumstances, the Commissioner finds that the Ministers were entitled to withhold the legal advice under section 36(1) of FOISA.



Timescale – section 21

39. The Ministers stated that they regretted the time taken to respond to Mr MacPherson's review request. In responding to Mr MacPherson's requirement for review, they apologised for this. They explained to the Commissioner that, at the time, they believed it appropriate to consider their approach to the use of section 18 of FOISA, in the light of a decision from the Commissioner in this area and also Sir David Bell's Report of January 2013 regarding the Ministerial Code. Unfortunately, this consideration took longer than expected and held up their response to Mr MacPherson.
40. In his application, Mr MacPherson submitted that the delay suggested either prevarication or a failure to take the request seriously. The Ministers disagreed, but appreciated that Mr MacPherson should not have been kept waiting so long (although they commented that the result of their deliberations was that they were able to disclose more information than he would have received if the review had upheld the use of section 18).
41. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to qualifications which are not relevant in this case.
42. Since the Ministers did not provide a response to Mr MacPherson's requirement for review within 20 working days, the Commissioner finds that they failed to comply with section 21(1) of FOISA. She appreciates the Ministers' desire to take account of all relevant circumstances in carrying out a review and to provide as full a response as possible, but Parliament has determined that this can (and shall) be done within 20 working days from receipt of the requirement for review. There can be no reasonable excuse for it taking six months: the Ministers may have wished to be seen to carry out a comprehensive and robust review, but the consequence of this was the applicant reached his own conclusions from the delay in being provided with a response.
43. Given the Ministers have now responded to Mr MacPherson's requirement for review, the Commissioner does not require them to take any further action in this case, in response to Mr MacPherson's application.

DECISION

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

For the reasons set out above, the Commissioner finds that the Ministers were entitled to withhold the information from Mr MacPherson under section 36(1) of FOISA.

The Commissioner also finds that the Ministers failed to respond to Mr MacPherson's requirement for review within the time limit set down by section 21(1) of FOISA.



Appeal

Should either Mr MacPherson or the Scottish 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.

Rosemary Agnew
Scottish Information Commissioner
24 February 2014



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.

...

- (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.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...