

# Decision Notice



Decision 079/2013 Dr Wilson McLeod and the Scottish Ministers

Use of Gaelic in the Scottish Government's corporate identity

Reference No: 201201501

Decision Date: 29 April 2013

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

On 28 August 2011, Dr Wilson McLeod from the University of Edinburgh's School of Celtic and Scottish Studies asked the Scottish Ministers (the Ministers) for information relating to the use of Gaelic in the Scottish Government's corporate identity, including its logo. The Ministers disclosed some information, but withheld other information on the basis that its release would prohibit the free and frank provision of advice to Ministers. Following a review, in which the Ministers disclosed part of the withheld information, Dr McLeod remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Dr McLeod's request for information entirely in accordance with Part 1 of FOISA, by incorrectly withholding some of the information covered by his request under sections 29(1)(a) and 30(b)(i) of FOISA. She accepted that some of the information was exempt from disclosure under section 29(1)(a) of FOISA. She required the Ministers to release the information which had been wrongly withheld to Dr McLeod.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b)(i) (Prejudice to effective conduct of public affairs)

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

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1. On 28 August 2011, Dr McLeod wrote to the Scottish Ministers (the Ministers) requesting the following information:

"Any information held by the Scottish Government relating to the use of Gaelic in the Scottish Government logo or other expressions of the Scottish Government's corporate identity. This request encompasses correspondence, emails, memoranda, reports, notes, and minutes of meetings.



The time frame for this request is 4 May 2007 to 31 July 2008.”

2. The Ministers responded on 30 September 2011. The Ministers provided Dr McLeod with some information (the most recent of which was dated August 2007), but advised him that they were withholding other information in terms of sections 29(1)(a) and 30(b)(i) of FOISA.
3. On 22 November 2011, Dr McLeod wrote to the Ministers requesting a review of their decision. Dr McLeod argued that four years had passed since the documents were created and that the matters discussed were not a matter of on-going policy (given that the process had effectively come to an end in August 2007), nor were they a matter of significant public concern or political sensitivity.
4. The Ministers failed to respond to Dr McLeod’s letter and he wrote to them again on 2 February 2012, asking them to provide him with a formal response to his letter of 22 November 2011.
5. The Ministers notified Dr McLeod of the outcome of their review on 23 February 2012. The Ministers provided Dr McLeod with some of the information they had earlier withheld, but continued to withhold other information in terms of the exemptions contained in sections 29(1)(a) and 30(b)(i) of FOISA.
6. On 1 August 2012, Dr McLeod 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.
7. The application was validated by establishing that Dr McLeod 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.

## Investigation

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8. On 3 September 2012, the Ministers were notified in writing that an application had been received from Dr McLeod and were asked to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested on 21 September 2012 and the case was then allocated to an investigating officer.
9. The schedule of documents accompanying the withheld information indicated that the exemption in section 29(1)(b) of FOISA had been applied to one of the withheld documents, in addition to the exemptions cited previously.
10. The investigating officer subsequently contacted the Ministers on 11 October 2012, 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 reliance on any provisions of FOISA they considered applicable to the information requested, including section 29(1)(b) of FOISA.



11. The Ministers did not respond to this letter until 19 December 2012. In their response they submitted that they were still relying upon the exemptions contained in sections 29(1)(a) and 30(b)(i) of FOISA to withhold information from Dr McLeod, but were no longer seeking to rely upon the exemption contained in section 29(1)(b) of FOISA.
12. The relevant submissions received from both the Ministers and Dr McLeod will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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13. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Dr McLeod and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Withheld information

14. In this case, the Ministers withheld information from three documents. The Ministers numbered these documents in the schedule provided to the Commissioner on 21 September 2012, and the same numbers will be used to refer to these documents throughout this decision. Details of each of the three documents are listed below:
  - Document 3 - Confidential submission on name change to the Permanent Secretary, dated 13 July 2007 – whole document withheld (parts of it fall outwith the scope of request).
  - Document 6 - Submission to the Ministers on use of Gaelic for the name change to Scottish Government, dated 18 July 2007 – whole document withheld.
  - Document 10 - Note of Name Change Project Group meeting, dated 15 August 2007 – relevant extract from document withheld.

### Section 29(1)(a) – Formulation of Scottish Administration policy

15. The Ministers claimed that all of the information withheld from Dr McLeod was exempt from disclosure in terms of section 29(1)(a) of FOISA.
16. Under section 29(1)(a) of FOISA, information held by the Scottish Administration (which, in terms of section 126 of the Scotland Act 1998, includes the Ministers) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" 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 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 that existing policy.
17. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy.



18. The Ministers have submitted that the withheld information relates to proposals for changing the name and corporate identity of the Scottish Executive to “The Scottish Government”. At the time the three documents were written, the Ministers had already decided, in principle, to change the name, and the purpose of the documents was to offer options and make recommendations on how that change could be achieved and managed. The Ministers have argued that while the name change was not a highly contentious public issue, Ministers and officials needed to be able to fully consider and debate all relevant issues.
19. The Ministers have stated that the Scottish Government continues to take steps to ensure that Gaelic is visibly represented in its business and, in addition to the measures outlined in its initial response to Dr McLeod, the Scottish Government has recently adopted the Gaelic bilingual version of the logo as standard across all its communications wherever it appears. The Ministers have submitted that the issue of promoting Gaelic as a language is still a “live one”, and they suggest that if the withheld information were to be disclosed, what is said in relation to Gaelic may be taken out of context or be misrepresented.
20. Having considered the withheld information and the Ministers' arguments, the Commissioner accepts that the withheld information comprises information which relates to the formulation of government policy and, therefore, falls within the scope of the exemption contained in section 29(1)(a) of FOISA. The Commissioner notes that, at the time these three documents were drafted, discussions regarding the name change were at a relatively early stage of policy development and that these documents were setting out options and recommendations so that Ministers could make a fully informed decision on the matters raised.
21. The exemption in section 29(1)(a) is a qualified exemption, which means that it 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 29(1)(a), 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.

*Public interest test – submissions from the Ministers*

22. The Ministers acknowledged that there is a public interest in ensuring transparency and accountability in the decision making of government. However, they considered that this is outweighed by the need for both Ministers and officials to have the space in which to fully discuss and develop policies. The Ministers stated that it is important that consideration can be taken of all, even the most unlikely, outcomes and that Ministers and officials can discuss and debate these in order to reach a considered decision, policy, or way forward.



23. The Ministers submitted that if the withheld information was disclosed, officials would exercise an increased degree of caution in preparing such papers in the future. The Ministers argued that this would lead to a qualitative change in the views expressed, the options offered, the recommendations made and the substance of the information contained in those papers. They considered it far less likely that a full range of options would be put forward, particularly when not all options would necessarily be in line with a stated policy or considered to be politically acceptable. In addition, fears about disclosure might incline officials to play down or even ignore any concerns they might have. The Ministers argued that all of this could limit the range of options considered, rendering the legislative and policy-making process less robust.
24. The Ministers submitted that the focus of the three documents in question was the change of name to “The Scottish Government”, not a debate about the use of Gaelic. As the latter is already being actively promoted by the Scottish Government and Ministers, the Ministers argued that little would be gained by releasing the requested information.

*Public interest test – submissions from Dr McLeod*

25. Dr McLeod has argued that the information he is seeking is several years old and does not relate to an ongoing decision-making and policy-making process. In light of this, Dr McLeod has submitted that the policy rationale for confidentiality and non-disclosure has faded, and the requested information should be disclosed. Dr McLeod has argued that, in this case, the public interest in disclosure outweighs the public interest in maintaining the exemption.

*Public interest test – the Commissioner’s conclusion*

26. The Ministers have acknowledged that the changeover from “The Scottish Executive” to “The Scottish Government” was not a highly contentious public issue. The Ministers have also submitted that, while the withheld information focuses on the issues relating to the name change, they see the issue of promoting Gaelic as a language as a “live one”; they suggest that if the withheld information was disclosed, what is said in relation to Gaelic may be taken out of context or be misrepresented, or have the effect of unnecessarily fuelling an on-going debate around the promotion of Gaelic, which the Scottish Government is already actively pursuing.
27. In essence, as well as expressing concerns that officials would no longer provide Ministers with a full range of options in any policy area for fear of future public disclosure, the Ministers also feared that readers could draw inaccurate conclusions from the references to Gaelic in the withheld documents.
28. The Commissioner notes that this policy was essentially finalised in 2007, when the name change was formalised. This was some four years before Dr McLeod requested the information. Given the fact that the name change has taken place and is no longer a “live” policy, and given that the Ministers concede that, even when it was a live policy, it was not a highly contentious public issue, the Commissioner finds it difficult to accept that it is clearly in the public interest for the requested information to be withheld in this case.



29. The Commissioner then considered the public interest arguments as they related to the use or promotion of Gaelic, which the Ministers have described as a “live issue”. The Ministers have expressed concerns that the withheld information may be misinterpreted and give a misleading impression of the Scottish Government’s commitment to the promotion of Gaelic. However, the risk of misinterpretation in this case has not been shown to be higher or more likely than in any other case where internal documents have been disclosed under FOISA. If this was a real concern in relation to the information covered by Dr McLeod’s request, the Ministers could have considered mitigating the risk of misinterpretation by providing additional contextual explanation; for example, explaining that the documents in question had a different policy focus.
30. The other key public interest argument raised by the Ministers is that if the information was disclosed, it would dissuade officials from presenting Ministers with a full range of options in future, rendering the legislative and policy-making process less robust. The Commissioner is not persuaded by these arguments, which, in relation to documents 3 and 6, were presented without any explanation of why this would be the consequence of disclosing the particular information in question.
31. In relation to document 10, the Ministers provided some contextual background to the information considered exempt from disclosure, and outlined the level of harm that would occur if this information was disclosed. The Commissioner has considered the Ministers’ arguments with regard to the information withheld from document 10 and she is satisfied that disclosure of this information would not be in the public interest. The Commissioner considers that there is a real risk that if this information was disclosed, officials may be dissuaded from fully expressing their own views and recommendations. If this occurred, the Commissioner acknowledges that it would weaken the ability of Ministers to make fully informed decisions and this, in turn, would render the legislative and policy making process less robust. In conclusion, the Commissioner upholds the application of section 29(1)(a) to the information withheld in document 10.
32. With regard to the information being withheld in documents 3 and 6, the Commissioner finds that the general public interest in providing access to information held by Scottish public authorities, promoting openness and transparency, outweighs any competing public interest in maintaining the exemption in section 29(1)(a) of FOISA.

### **Section 30(b)(i) – Prejudice to effective conduct of public affairs**

33. The Ministers are also relying on the exemption contained in section 30(b)(i) of FOISA to withhold documents 3 and 6. In order for the Ministers to rely on this exemption, they must show that the disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.



34. It is the Commissioner's view, as stated in previous decisions, that the standard to be met in applying the tests contained in these exemptions is high. In applying the exemptions, the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially (as the case may be) the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.
35. As with other exemptions importing 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 (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would require to be at least a significant probability of it occurring.
36. Each request should be considered on a case by case basis, taking into account the effects on the future provision of advice anticipated from disclosure of the particular information involved. 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 would have any bearing: releasing advice whilst a decision was being considered, and for which further views were still being sought, for example, could be more substantially inhibiting than disclosure once advice had been taken.
37. The Ministers submitted that it is vital that they are able to receive free and frank advice in order to understand and debate issues and to reach a considered opinion. It is also imperative for Ministers to be able to acquire the full facts when asked to approve and confirm any potential "political" issues, e.g., in this case, pressure to improve the visibility and status of Gaelic. It was argued that if the information withheld from Dr McLeod was released into the public domain, the Ministers would feel constrained from seeking information and officials would be reluctant to offer full and frank background information and advice on any similar issues.
38. The Ministers stated that the withheld information was provided to Ministers in order to develop the policy context and in order to enable Ministers to fully consider the facts and make informed decisions on the most appropriate way forward in the rebranding of the Scottish Government. They took the view that, in light of the Scottish Government's subsequent activity and commitment to promoting Gaelic in Scotland, nothing would be gained by releasing the information, while withholding it would be unlikely to inhibit anyone and "may only serve to confuse and upset the Gaelic community".
39. When considering the harm test in relation to section 30(b)(i), the Ministers argued that disclosure of the withheld information would be likely to inhibit substantially the future free and frank provision of advice to Ministers. They found it "very likely" that exchanges of this nature would be jeopardised if these communications were considered suitable for release into the public domain. If disclosure occurred, it was argued that Ministers would feel constrained from seeking information and officials would be reluctant to offer full and frank background and advice on any similar issues, and that this would be to the detriment of policy and decision-making processes and would severely constrain the Ministers' ability to undertake statutory obligations.





40. The Ministers submitted that Government officials must be able to have free and frank discussions on proposed policies with Ministers, without fear of the details of those discussions being released. The Ministers pointed out that an organisation's position on any issue does not typically emerge fully formed, but is usually the result of careful discussion and the exchange of views. For the Government, this process includes advice to Ministers who must make the ultimate judgement. The Ministers considered it vital that Ministers and officials should free feel able to express and debate advice frankly and confidentially.
41. The Commissioner has considered the content of documents 3 and 6, along with the Ministers' submissions on section 30(b)(i) of FOISA, but she is not persuaded that the exemption is engaged. As noted above, for the Commissioner to accept the application of this exemption, the Ministers must be able to demonstrate a real risk or likelihood that actual inhibition will occur at some time in the near (certainly the foreseeable) future, not simply that inhibition is a remote or hypothetical possibility. For inhibition to be likely, there would require to be at least a significant probability of it occurring.
42. While the Commissioner accepts that the failure of officials to provide Ministers with thorough background information and a full range of options would be likely to have a detrimental impact on policy and decision-making process, she does not consider that the Ministers have established that such inhibition would be likely to occur as a result of disclosure of the requested information in this case.
43. The Commissioner has carefully reviewed the contents of documents 3 and 6 and finds nothing within them that would inhibit any official from presenting Ministers with similar full and frank background and advice. She can identify nothing in the content of this information which might reasonably be expected to have any significant inhibiting effect on the free and frank provision of advice in future. None of the views or comments in the information are expressed with any notable degree of frankness or candour: on the contrary, the content of the information appears measured and considered in relation to the subject matter.
44. As noted previously, while the information was created at an early stage of policy development, it was several years old when Dr McLeod made his request, and the rebranding of the Scottish Government had taken place. The Commissioner therefore finds that any sensitivity relating to the context in which the information was created has diminished, along with the likelihood that disclosure would inhibit officials from providing similar advice in future.
45. In the circumstances, and after considering all arguments put forward by the Ministers, the Commissioner is not persuaded that disclosure of the information in documents 3 and 6 would, or would be likely to, substantially inhibit officials from providing such advice in future. The Commissioner would emphasise that disclosure must always be considered on a case by case basis, taking account of the particular circumstances of each case. Accordingly, the Commissioner does not uphold the application of the exemption contained in section 30(b)(i) of FOISA. As the Commissioner has found this exemption cannot be upheld, she is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.



## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Dr McLeod. She finds that by wrongly withholding the information in documents 3 and 6 under the exemptions contained in section 29(1)(a) and 30(b)(i) of FOISA, the Ministers failed to comply with Part 1 of FOISA. However, the Ministers correctly withheld the information contained in document 10 under section 29(1)(a) of FOISA.

The Commissioner therefore requires the Ministers to disclose to Dr McLeod all the information in document 6, and the parts of document 3 which are covered by the terms of his request, by **13 June 2013**.

## Appeal

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Should either Dr McLeod or the Scottish 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**29 April 2013**



## Appendix

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### 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.

##### 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;

...

**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-

(i) the free and frank provision of advice; or

...