

Decision Notice



Decision 103/2014 Mr Alisdair MacPherson and the Scottish Ministers

Legal advice

Reference No: 201400129
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Summary

On 15 July 2013, Mr MacPherson asked the Scottish Ministers (the Ministers) for information on legal advice. The Ministers responded by withholding the information under the FOISA exemptions relating to legal professional privilege and the effective conduct of public affairs. Following an investigation, the Commissioner accepted this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 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 15 July 2013, Mr MacPherson wrote to the Ministers in the following terms:
I have been advised by the Scottish Government that legal advice has been sought by the Scottish Government regarding the share of the United Kingdom's current oil and gas revenue which Scotland would be legally entitled to were it to become an independent state.
 - (a) *Please confirm that such legal advice sought has now been received.*
 - (b) *If such advice has been sought please provide details of the date or dates when such advice was sought.*
 - (c) *Please also provide details regarding who the advice was sought from.*
 - (d) *Please also provide details regarding the date or dates when such advice was received after having been sought.*
 - (e) *If such advice has been sought and received please provide me with the content of this advice or inform me where it is publicly available.*



2. The Ministers responded on 15 August 2013. They responded to part (a) of the request by confirming that legal advice had been sought and received. They withheld the content of the advice under section 36(1) of FOISA and the remaining information under section 30(c). They also considered the dates on which the advice was sought and received to be exempt under section 36(1).
3. On 29 August 2013, Mr MacPherson wrote to the Ministers requesting a review of their decision. He disagreed with the Ministers' application of sections 30(c) and 36(1) of FOISA.
4. The Ministers notified Mr MacPherson of the outcome of their review on 26 September 2013, upholding their original decision without modification.
5. On 16 January 2014, 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 11 February 2014, the Ministers were notified in writing that an application had been received from Mr MacPherson and were 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. These sought to confirm what information fell within the scope of the request, and to obtain reasons for the Ministers' application of any provisions of FOISA they considered applicable to the information requested.
9. The Ministers provided submissions to the investigating officer. Mr MacPherson also provided submissions as to why he believed it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

10. 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.



11. Having considered the Ministers' submissions, the Commissioner agrees with them on what information fell within the scope of the various parts of the request.

Section 30(c) - Prejudice to the effective conduct of public affairs

12. Section 30(c) exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from such disclosure.
13. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.
14. The Commissioner takes the view that it is important for public authorities to treat each request for information on a case-by-case basis. Release of information in one case should not be taken to imply that information of a particular type will routinely be released in future. The circumstances of each case, including the content of the information under consideration and the timing of the request, must be taken into consideration.
15. The Ministers submitted that disclosure of the dates when the legal advice was sought and received, and of who the advice was sought from, would be likely to prejudice the effective conduct of public affairs substantially.
16. They believed disclosure of the source of any advice would be likely to lead to conclusions being drawn from the fact that any particular lawyer, or group of lawyers, had (or had not) been asked for advice on a particular matter, which would in turn be likely to impair their ability to develop policy in this area in the event of a vote in favour of independence.
17. The Ministers went on to argue that disclosing who advice was sought from would significantly harm the conduct of public affairs by breaching the Law Officer Convention. It would reveal whether or not advice on this topic had been sought from the Law Officers, which would in turn encourage people to draw conclusions regarding the importance placed by Government on the subject matter of the request. It would also reveal whether or not there were uncertainties regarding the Scottish Government's position. As a result, the Ministers believed undue pressure would be placed on Ministers and officials to consider these factors in the future before deciding whether to consult Law Officers.



18. Regarding the specific dates on which legal advice was sought or received by the Scottish Government, the Ministers argued that disclosure would be likely to lead to conclusions being drawn based on:
 - how many times advice was sought and received
 - the points at which advice was sought, and
 - how long it took lawyers to provide the advice.
19. The Ministers believed that if advice had been sought many times on a given topic, this would be likely to be interpreted as uncertainty about their legal position. Equally, having sought legal advice only once would be likely to be interpreted as a lack of sufficient legal consideration being given to the issue. They also submitted that events in the Scottish Parliament or the press at the time advice was sought could be interpreted as having a bearing on the decision to seek advice. Finally, conclusions could be drawn from the length of time taken to provide advice (for example, taking some time to provide the advice would be likely to be viewed as due to legal uncertainty and lawyers having difficulty reaching a position).
20. All of these factors, the Ministers argued, would be likely to significantly harm the effective conduct of government business, by dissuading officials and/or Ministers from requesting legal advice as and when they needed it. Disclosure could also put lawyers under greater pressure to provide advice within relatively short timescales, which could impact on the quality of legal advice provided in future.
21. The Commissioner has considered these submissions carefully. Elements of them appear somewhat over-stated, suggesting an overly pessimistic view of public and media attitudes. That said, she acknowledges the importance of the Law Officer Convention and the real risk of prejudice to that Convention in revealing whether or not the Law Officers have been consulted in relation to a matter of this significance. She accepts a genuine risk of undesirable pressure deriving from revealing the time taken to provide advice, particularly in relation to a matter of this significance. She would emphasise that she has reached this conclusion in the circumstances of this particular case and is not suggesting that any particular class of information automatically engages the exemption in section 30(c).

Public interest test

22. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. In other words, even where the exemption applies, the information must be disclosed unless, in all the circumstances, the public interest in maintaining the exemption outweighs that in disclosure.
23. Mr MacPherson emphasised what he considered to be the significance of the information in enabling the people of Scotland to be as well-informed as possible in advance of the independence referendum. Describing the referendum as unprecedented, he considered the circumstances of this case to be exceptional and highly compelling. He acknowledged that the



Ministers made their decision before publication of their White Paper “Scotland’s Future” in November 2013.

24. The Ministers acknowledged a general public interest in disclosure to promote transparency and inform public debate, but did not believe disclosure of the particular information withheld under section 30(c) would add significantly to the public’s understanding of the issues on which advice was sought.
25. The Ministers considered there to be a strong public interest in enabling them to determine how, and from whom, they sought legal advice. They believed they should be able to do this without facing external pressure or concerns that particular conclusions might be drawn from the fact that any particular lawyer, or group of lawyers, had (or had not) been asked to provide legal advice on a particular matter.
26. The Ministers also highlighted the effects of disclosure on the Law Officer Convention, as detailed above. They submitted that there could be no public interest in breaching that Convention by divulging which lawyer or lawyers were asked to provide advice on any issue: there was a strong public interest in maintaining the Convention, endorsed by the courts in the interests of good governance and the maintenance of the rule of law. In the circumstances of this particular case, they could identify no exceptional circumstances which would justify disclosure.
27. The Ministers emphasised that there was a strong public interest in Ministers and officials being able to seek advice as and when they saw fit (and needed it), and for lawyers to be able to provide their advice when they were ready to do so, without undue scrutiny as to why advice was sought or provided at a particular time. They highlighted the risk of placing lawyers under pressure to provide advice too quickly, as described above. Again, they could identify no exceptional circumstances in this case which would justify the disclosure of dates.
28. Having considered the matter thoroughly, the Commissioner accepts that there is a general public interest in transparency in the conduct of public affairs. In the particular circumstances of this case, she has identified no more specific public interest in disclosure of who advice was sought from and the related dates. In relation to the information on when the advice was sought and received and from whom, she accepts that there are public interest arguments of substance which support maintaining the position advanced by the Ministers (and arguments of particular strength in relation to the Law Officer Convention).
29. On balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding the information. In all the circumstances, therefore, the Commissioner concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. As a consequence, the Commissioner finds that the Ministers were entitled to withhold the information to which they applied this exemption.



Section 36(1) - Confidentiality

30. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege, which the Ministers argued applied in this case.
31. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - a. The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
 - b. The legal adviser must be acting in his/her professional capacity, and
 - c. The communications must occur in the context of the legal adviser's professional relationship with his/her client.
32. The Ministers submitted that section 36(1) of FOISA applied to the content of the legal advice because the advice was provided by a qualified lawyer and was legal advice provided in the context required for legal advice privilege to apply.
33. The Ministers also argued that the dates on which the legal advice was sought and received should be withheld under section 36(1). As the Commissioner has accepted that this information was properly withheld under section 30(c) of FOISA, this is not an argument she is required to consider here.
34. Having considered the content of the information withheld as legal advice and the circumstances under which it was received by the Ministers, the Commissioner is satisfied that this information meets the conditions set out in paragraph 31 above and therefore is subject to legal advice privilege.
35. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that this information remained confidential at the time the Ministers dealt with Mr MacPherson's information request and requirement for review (and that it remains so now).

Public interest test

36. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA.
37. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a



Freedom of Information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien* [2009] EWHC 164 (QB).¹ Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.

38. Mr MacPherson's public interest arguments are summarised in paragraph 23 above.
39. The Ministers submitted that the public interest in promoting transparency and informing public debate had been met, in part, by information already published setting out the Scottish Government's position on maritime boundaries (and therefore, by implication, the share of revenues which would be considered Scotland's, rather than those of the rest of the UK). They referred to elements of Chapter 8 of the White Paper "Scotland's Future".
40. The Ministers believed any public interest in disclosure was outweighed by the strong public interest in maintaining confidentiality of communications between legal advisers and their clients. They emphasised the importance of lawyers being able to provide free and frank legal advice to their clients, without fear that it would be divulged publicly.
41. Additionally, the Ministers believed it was important to note that, in the event of a vote for independence, there would need to be negotiation between the Scottish and UK Governments on a range of matters in order to reach an independence settlement. These would include the subject matter of this legal advice. They considered there to be a strong public interest in being able to obtain good quality advice on the issues that would be relevant, to inform their approach to such negotiations. It would not be in the public interest for that approach to be prejudiced by the disclosure of such advice.
42. The Commissioner acknowledges that there will be occasions where the significant public interest in favour of withholding legally privileged communications 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 discloses an apparently irresponsible and wilful disregard of advice
 - a large number of people are affected by the advice
 - the passage of time is so great that disclosure cannot cause harm.
43. After careful consideration, the Commissioner is satisfied that none of the considerations set out above apply here. She accepts that a reasonable amount of information on the subject

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<http://www.itspublicknowledge.info/nmsruntime/logLink.aspx?linkURL=http%3a%2f%2fwww.bailii.org%2few%2fcases%2fEWHC%2fQB%2f2009%2f164.html>



matter of the request has been published, in the White Paper and earlier in the paper entitled “Maximising the Return from Oil and Gas in an Independent Scotland”², to serve the public interest in transparency. She also acknowledges that the Ministers were required to respond to Mr MacPherson’s requirement for review before the position set out in the White Paper could be said to have been finalised.

44. The Commissioner acknowledges the strong inherent public interest in maintaining legal professional privilege. In this case, having considered the information in context, she has been unable to identify any public interest of equal or greater weight which would favour disclosure.
45. In all the circumstances of the case, therefore, the Commissioner is satisfied that the public interest in disclosing this information is outweighed by the public interest in maintaining the exemption in section 36(1). Consequently, she finds that the Ministers were entitled to withhold the information under that exemption.

DECISION

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

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
12 May 2014

² <http://www.scotland.gov.uk/Resource/0042/00428074.pdf>



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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

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

...