

Decision Notice

Decision 160/2014 Mr Tom Gordon and the Scottish Ministers

Modelling relating to proposals for childcare

Reference No: 201400889

Decision Date: 21 July 2014



Scottish Information
Commissioner

Summary

On 21 January 2014, Mr Gordon asked the Scottish Ministers (the Ministers) for the full results of any modelling done on the childcare proposals on page 194 of the White Paper, Scotland's Future. The Ministers withheld the information under section 29(1)(a) of FOISA on the basis that it related to the formulation or development of government policy.

The Commissioner found that the Ministers were entitled to withhold the information under this exemption.

Relevant statutory provisions

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

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

Background

1. On 21 January 2014, Mr Gordon emailed the Ministers with the following request:

"On 12 January 2014, the Scottish Government published a paper titled 'Childcare and Female Labour Market Participation'

<http://www.scotland.gov.uk/Resource/0044/00441783.pdf>

It describes the potential economic impact of a rise in female workforce participation modelled using the 'Computable General Equilibrium model of the Scottish Economy'.

Footnote 4 on p4 of the paper states that the impact of the SNP's specific childcare proposal (Scotland's Future, p. 194, November 2013) has not been modelled.

"Note the analysis below illustrates the impact of a boost in female participation rates rather than a specific policy. The specific proposal will have its own unique implications for the economy and budgetary impacts. These are not simulated here."

Please supply the full results of any modelling which has been done on the specific childcare proposals on p 194 of Scotland's Future".

2. The Ministers responded on 21 February 2014. They informed Mr Gordon that the Scottish Government had published modelling on the impact of achieving female labour market participation comparable to Sweden. They provided Mr Gordon with links to two Government publications containing those modelling results.
3. On 11 March 2014, Mr Gordon emailed the Ministers requesting a review of their decision. He noted that the Ministers' response had not claimed that they did not hold the information he had asked for, and believed this remained a possibility.

4. The Ministers notified Mr Gordon of the outcome of their review on 17 April 2014. They stated that the information to which he had been referred related to the childcare proposals on page 194 of Scotland's Future. They also stated that they held additional information, which they considered to be exempt from disclosure in terms of section 29(1)(a) of FOISA on the basis that it related to the development of Scottish Government policy on childcare.
5. On 24 April 2014, Mr Gordon 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. Mr Gordon disagreed that the information was exempt from disclosure under section 29(1)(a) of FOISA. Additionally, he considered that, under section 29(2)(a), any statistical information used to provide an informed background to the taking of the decision ought to be disclosed. This was on the basis that the decision as to policy in this case had already been taken by the Ministers.
6. The application was validated by establishing that Mr Gordon 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 1 May 2014, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with the 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers responded on 18 June 2014, providing submissions on their application of the exemption in section 29(1)(a) of FOISA, and commenting on whether any statistical information fell to be disclosed under section 29(2)(a) of FOISA. At this stage, the Ministers stated that they also considered the information to be exempt from disclosure in terms of section 30(c) of FOISA on the basis that its disclosure would otherwise (than under section 30(b)(i) or (ii)) prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
10. The investigating officer subsequently sought (and received) additional submissions from Mr Gordon on the Ministers' application of the exemption in section 30(c) of FOISA.

Commissioner's analysis and findings

11. 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 Gordon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

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

12. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish

Administration and their staff) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.

13. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation, and when.
14. In his application to the Commissioner, Mr Gordon disagreed that the development of policy was ongoing, as the Ministers' policy on free childcare was detailed on page 194 of Scotland's Future. In his view, the policy on extending childcare was quite clear and was a central theme of the independence referendum debate. He did not consider that the modelling exercise in question was still part of any policy formulation or development.
15. The Ministers submitted that the information consisted of a high level analysis of the costs of providing childcare, the results of which helped inform the proposals set out in Scotland's Future. They stated that the development of this childcare policy was ongoing, as was their work to develop an analysis of costings, particularly as the Scottish Government had committed to further increased levels of childcare support through the Children and Young People (Scotland) Act 2014 (the 2014 Act).
16. The Ministers stated that, while their overarching policy ambition had been set out in the 2014 Act and in Scotland's Future, the analysis work was still being refined as the policy developed, particularly on the basis of discussions with the Convention of Scottish Local Authorities (COSLA) to negotiate an agreed settlement for local authorities to provide additional childcare.

The Commissioner's view on the exemption

17. As stated above, policy formulation is considered to encompass the early stages of the policy process, where the options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers.
18. In this case, the Commissioner acknowledges that Scotland's Future sets out the Ministers' policy on extending the provision of childcare. However, in her view, the policy direction set out in Scotland's Future cannot be interpreted as anything other than high level policy, statements and aspirations which would be subject to development.
19. The Commissioner accepts the Ministers' position that the detail of the policy under consideration has not yet been finalised and set out. She also accepts that the withheld information relates to the policy, in being a key part of the information being developed and used in the policy development process. Therefore, she is satisfied that the information falls within the scope of 29(1)(a) on the basis that it relates to a topic which is a matter of developing policy.
20. The exemption in section 29(1)(a) is a qualified exemption, subject to the public interest test 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.

The public interest test

21. In their submissions to the Commissioner, the Ministers stated that they did not consider that disclosure of the information would help inform public debate, given that their childcare policy had evolved since the analysis of the information under consideration was prepared. The Ministers stated that greater commitments had been set out in the 2014 Act. The Ministers noted that the cost estimates provided in the Financial Memorandum accompanying the Bill (for the 2014 Act) had been published and provided some information to inform the public on the estimated costs of the Bill's childcare provisions. The Ministers also stated that additional analysis was being undertaken and would be published once it was completed.
22. The Ministers considered that disclosure of the withheld information would be likely to undermine their ability to continue to develop the policy effectively by focussing attention on proposals at a particular point in time, even though those proposals were still evolving.
23. The Ministers considered there was a strong public interest in allowing Ministers and officials to have the private space to consider, develop and advise on detailed policy proposals without undue public scrutiny regarding one aspect; in this case, their initial cost assumptions. They also considered it important that they could consider the arguments put forward by COSLA alongside their own analysis to assess their robustness and their policy implications before reaching a final settlement.
24. The Ministers submitted that there was a strong public interest in avoiding impeding robust and thorough policy development in this high profile area. They considered that if analysis and evidence that was provided to inform policy at an early stage were to be released, the way in which those outdated figures might be interpreted by the public would have a strong influence on the way policy was developed in future. Officials would be deterred from producing and/or saving analysis at an early stage due to concerns that their analysis might turn out to be incorrect.
25. The Ministers also considered that the information might be misconstrued and interpreted as final cost estimates. They considered this could be misleading for the public and potentially confusing, given the significant refinements made to the analysis in the time since it was carried out.
26. In his application to the Commissioner, Mr Gordon disagreed with the Ministers' assertion that they required the time and space to consider all available options whilst detailed policy work was continuing. He submitted that the Ministers had placed an impossible pre-condition on the disclosure of the modelling. In his view, exploring all available options was a potentially never-ending task, as was the tweaking of details of the policy; policies were always liable to refinement and evidence was always accumulating.
27. In Mr Gordon's view, the policy on extending childcare was quite clear and had become a central theme of the independence referendum debate. He considered it untenable for the Ministers to argue that the modelling exercise was still part of private policy formulation or development.

The Commissioner's view on the public interest test

28. The Commissioner has considered carefully the representations made by both Mr Gordon and the Ministers when balancing the public interest arguments both for and against disclosure of the withheld information.

29. The Commissioner acknowledges that there is a general public interest in transparency and accountability and in scrutinising the actions taken by Ministers in the field of policy development.
30. The Commissioner also considers that disclosure of the information could offer a more informed public understanding of a key aim of the Ministers in the event of Scottish independence. This could have a bearing on the matters that voters weigh up when considering the consequences of the forthcoming independence referendum.
31. The Commissioner accepts that the withheld information in this case was relevant in informing the Ministers' consideration and refinement of policy development and options which were current when they dealt with this request and requirement for review (and remain so).
32. The Commissioner acknowledges the general public interest in allowing all options to be explored and considered by the Ministers while policy-making is ongoing, before a settled public view is reached. In her view, the Ministers have shown that their policy on childcare is not finalised and could continue to evolve.
33. The Commissioner notes Mr Gordon's points regarding the ongoing refinement of policy and consideration of options. In her view, it is always likely that policies will be honed and subject to amendment throughout the initial stages of development and beyond. She reiterates her view that the information under consideration informed a high level policy direction rather than a settled and finalised policy.
34. The Commissioner does not consider that the danger of information being misinterpreted (as suggested by the Ministers) in itself constitutes sufficient grounds for withholding it. In her view, in this case, even if the information could be considered for disclosure alongside an accompanying explanation and disclaimer regarding its context and purpose, the public interest would still favour maintaining the exemption.
35. In the absence of overriding public interest considerations favouring disclosure, the Commissioner considers it is in the public interest that the Ministers should be able to formulate policy fully and consider all analysis and evidence without being drawn into a public debate on matters which may never form part of their finalised policy position. The Commissioner also considers there is a public interest, in this instance, in allowing Ministers private space to consider the arguments put forward by COSLA alongside their own analysis whilst negotiating a final settlement with local authorities.
36. In all the circumstances of this case, the Commissioner has concluded that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA. The Ministers were therefore entitled to withhold the information under this exemption.

Section 29(2)(a) of FOISA – statistical information

37. Section 29(2)(a) of FOISA provides that once a decision as to policy has been taken, statistical information used to provide an informed background to the taking of the decision cannot be regarded as relating to the formulation or development of the policy in question.
38. As noted above, in his application to the Commissioner, Mr Gordon submitted that the provisions of section 29(2)(a) would allow the information to be disclosed. This was on the basis that the Ministers had taken a decision in relation to policy.

39. As noted above, the Commissioner does not agree that a decision has been taken on the final policy in this case. Accordingly, she accepts that the exemption in section 29(1)(a) applies to all of the withheld information in this case which falls within the scope of Mr Gordon's information request.
40. As the Commissioner has concluded that the Ministers were entitled to withhold the information under section 29(1)(a) of FOISA, she has not gone on to consider their application of the exemption in section 30(c).

Decision

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

Appeal

Should either Mr Gordon 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
21 July 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.

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-

- (a) the formulation or development of government policy;

...

- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of-

- (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or

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