

Decision Notice

Decision 165/2016: Mr Benjamin Dean and the Scottish Ministers

UK Shape of Training Steering Group

Reference No: 201600546

Decision Date: 20 July 2016



Scottish Information
Commissioner

Summary

On 1 February 2016, Mr Dean asked the Scottish Ministers (the Ministers) for information about the UK Shape of Training Steering Group (the Group).

The Ministers withheld the information on the grounds that it related to the formulation and development of government policy. Following a review, Mr Dean remained dissatisfied and applied to the Commissioner for a decision. The Ministers subsequently disclosed some information to Mr Dean.

The Commissioner investigated and found that the Ministers were entitled to withhold the remaining information under section 29(1)(a) (Formulation of Scottish Administration policy etc.) of FOISA.

She also found that the Ministers had wrongly withheld the information disclosed to Mr Dean during the investigation.

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 (4) (definition of "government policy") (Formulation of Scottish Administration policy etc.)

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 1 February 2016, Mr Dean made a request for information to the Ministers. He asked for all the documentation and meeting minutes of the Group to date.
2. By way of background, the Group is made up of representatives from each UK administration, along with other stakeholders, and is looking at proposals for changes to doctors' education and training.
3. The Ministers responded on 26 February 2016. They withheld the information under sections 28(1) (Relations within the United Kingdom) and 29(1)(a) (Formulation of Scottish Administration policy etc.) of FOISA.
4. On 26 February 2016, Mr Dean wrote to the Ministers requesting a review of their decision. He believed it was in the public interest for the information to be disclosed.
5. The Ministers notified Mr Dean of the outcome of their review on 24 March 2016. They upheld their reliance on sections 28(1) and 29(1)(a) and additionally claimed section 30(c) of FOISA (Prejudice to effective conduct of public affairs).
6. On 24 March 2016 Mr Dean wrote to the Commissioner's office. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Dean stated he was dissatisfied with the outcome of the Ministers' review because he believed it was in the public interest for the information to be disclosed.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Dean made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 7 April 2016, the Ministers were notified in writing that Mr Dean had made a valid application. They were asked to send the Commissioner the information withheld from Mr Dean. They provided the information and the case was allocated to an investigating officer.
9. 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, with particular reference to the exemptions applied in responding to Mr Dean.
10. The Ministers provided their submissions and also disclosed some information to Mr Dean. They now sought to rely on only sections 28(1) and 29(1)(a) of FOISA in respect of the remaining withheld information.
11. Mr Dean was also asked for, and provided, submissions.

Commissioner's analysis and findings

12. 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 Dean and the Ministers. She is satisfied that no matter of relevance has been overlooked.
13. The Commissioner has received no submissions as to why the Ministers considered themselves entitled to withhold the information disclosed to Mr Dean during the investigation, so she must conclude that they were not entitled to withhold this information under any of the exemptions claimed. She will now go on to consider the remaining withheld information, looking at the application of section 29(1)(a) of FOISA first.

Section 29(1)(a) of FOISA - Formulation and development of Government policy

14. Under section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. "Scottish Administration" is 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. In terms of section 29(4) of FOISA, and bearing in mind the timeframe of the request, "government policy" means the policy of the Scottish Administration.
15. 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.
16. "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.

17. The Commissioner notes that the Shape of Training Review (the Review) itself has been concluded and that the final Report¹ can be accessed online. The Group is charged with the task of formulating the Report's recommendations into a workable policy.
18. The Ministers submitted that the Group was established by UK Ministers with the remit of formulating and developing policy within the framework set by the Review. The work of the Group is to consider a range of complex and sensitive issues, to consider evidence and analysis, and to use this to make policy recommendations to Ministers from each of the UK administrations.
19. The Ministers stated that the process of policy formulation, although in its later stages, remained incomplete. Recommendations had yet to be finalised and had not been discussed with Ministers at this stage. At various stages of policy formulation, a range of issues and potential ways forward would have been considered by the Group, some of which might be dismissed, some amended and some progressed. It was the Ministers' position that much of the content of the documents being withheld contained the thinking that would allow officials to move towards a final policy, or options which could be recommended to the Ministers.
20. Having considered the remaining withheld information, the Commissioner accepts that it relates to the development of government policy, if not necessarily its formulation and, therefore, that it falls within the scope of the exemption in section 29(1)(a) of FOISA.

Public interest test

21. The exemption in section 29(1)(a) is a qualified exemption, which means that its application 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.

Submissions from Mr Dean

22. Mr Dean argued that the public interest would be best served by a fully transparent process, including the open publication of all evidence orally submitted to the Group. He was concerned that the meeting Minutes for the consultation process had not been published and was of the view that the argument for disclosure of the withheld information was overwhelming.
23. Mr Dean submitted that although the implementation process was still ongoing, the matter was one of key public interest in that the Review should be seen to be independent. He stated that the ongoing nature of the implementation made it even more important that any political influence upon the Review should be in the public domain, so that open, honest public debate could take place.
24. It was Mr Dean's view that disclosure of the information could only undermine or constrain the Government's views if these views were not in the best interests of patients. If disclosure would constrain the Government's view, Mr Dean argued, then the Government's view must

1

http://www.shapeoftraining.co.uk/static/documents/content/Shape_of_training_FINAL_Report.pdf_53977887.pdf

be weak and not evidence-based, in which case the public interest in disclosing the information only became stronger.

25. Mr Dean was of the view that there was potential for harm to arise from what he termed “misguided medical training reform” and that this added weight to the public interest in full transparency. He submitted that the benefits of full transparency far outweighed the benefits of private discussion, given that this was, in his view, a matter of key public interest. He contended that the implementation of the independent Review had been inappropriately influenced “off the record” in the past.

Submissions from the Ministers

26. The Ministers acknowledged that there was a public interest in openness and transparency with regard to the development of training for medical staff. They believed there was a stronger public interest in allowing Ministers and officials the private space to fully consider a range of relevant issues and questions which were essential for policy development and therefore future policy implementation. This could be hampered by the need to consider whether the subsequent publication of such information might lead to a misunderstanding of the Government’s position or of the likely outcomes.
27. The Ministers stated that much of the content of the withheld documents contained thinking that would allow officials to move towards final policy options which could be recommended to Ministers. It would not provide a clear insight into the likely implementation and/or potential effects of the final policy.
28. If the information requested was released into the public domain in advance of officials from all UK administrations concluding policy development and putting their final recommendations to Ministers, the Ministers argued, there could be a risk that policy formation and decisions would be further complicated, delayed and potentially jeopardised. Officials would feel the need to exercise significantly more caution in preparing such analysis in future. This would constrain the openness of discussions between the administrations and thereby significantly prejudice policy development, working relationships and, in this particular case, the ability to maintain a UK-wide consensus in future. The Ministers were of the view that this would not be in the public interest, as it would make it significantly harder for the Scottish Government to develop robust policies in future, especially in co-ordination with other UK administrations.
29. The Ministers continued that medical education and training policy was a highly sensitive and contentious issue, on which thinking had evolved and continued to evolve. The policy had not, therefore, been fully discussed, considered or implemented. Given the nature of the information requested, its disclosure while the policy remained in development would risk the analysis being taken out of context, misunderstood or used to create uncertainty about the Government’s intentions. This would not be in the public interest.
30. The Ministers believed that, on balance, there was a stronger public interest in withholding the information than in disclosing it. The Ministers stated that a degree of public interest had already been satisfied by the fact that information had already been disseminated into the public domain (in a statement² issued by the Steering Group in February 2015), indicating

2

http://www.shapeoftraining.co.uk/static/documents/content/Shape_of_Training_UK_Steering_Group_statement_Approved_version_16_2_15.pdf_59780421.pdf

the general approach to be taken in terms of the work and the areas to be explored by the UK Steering Group.

The Commissioner's conclusions

31. The Commissioner has considered carefully the submissions made by both Mr Dean and the Ministers when balancing the public interest arguments both for and against disclosure of the remaining withheld information.
32. She acknowledges that there is a general public interest in transparency and accountability, and in scrutinising actions taken in the process of policy development. She also accepts that disclosure of the information could offer a more informed public understanding of the thinking behind the policy developments, which are a matter of legitimate public debate.
33. The Commissioner must also take into account that the withheld information in this case was, and is, relevant in informing the Ministers' consideration and refinement of their policy position and options.
34. She acknowledges the general public interest in allowing all options to be explored and debated by the Ministers, and in allowing them to crystallize their position to feed back into the UK-wide policy discussions, while the policy-development process is ongoing and before a settled view is reached.
35. The Commissioner is aware that a new UK-wide policy on doctors' training has not yet been finalised and acknowledges that policy in this area is still subject to refinement and potential amendment.
36. The Commissioner has given due weight to the concerns put forward by Mr Dean, but is not persuaded (in all the circumstances of this case) that there is a sufficiently strong public interest favouring disclosure. She considers it is in the public interest that the Ministers should be able to formulate their policy position fully and consider all analysis and evidence, without being drawn into a public debate on matters which may never form part of the finalised UK policy position.
37. In all the circumstances of this case, the Commissioner has concluded that the public interest in disclosure of the remaining withheld information is outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA. The Ministers were therefore entitled to withhold the information under this exemption.
38. As she has found that the remaining information is properly withheld under section 29(1)(a) of FOISA, the Commissioner is not required to go on to consider the Ministers' application of section 28(1) in this case.

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 Dean.

The Commissioner finds that the information withheld by the Ministers at the close of the investigation was properly withheld under section 29(1)(a) of FOISA.

The Ministers initially withheld information they disclosed to Mr Dean during the investigation. The Commissioner finds that the Ministers were not entitled to withhold this information. In doing so, the Ministers failed to comply with section 1(1) of FOISA.

Given that this information has now been disclosed to Mr Dean, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Mr Dean's application.

Appeal

Should either Mr Dean 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

20 July 2016

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;

...

- (4) In this section-

"government policy" means -

- (a) the policy of the Scottish Administration; and
- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info