

Decision Notice 206/2021

First Minister's meetings with EU officials

The Applicant

Public authority: Scottish Ministers

Case Ref: 202001038



Scottish Information
Commissioner

Summary

The Ministers were asked for the records of the First Minister's overseas meetings with EU officials between May 2016 and December 2019.

The Ministers disclosed some information and withheld the remainder on the grounds that some of it was exempt from disclosure.

The Commissioner investigated and found that the Ministers had partially breached FOISA in responding to the request. The Ministers were not entitled to rely on the exemption originally relied on, failed to identify all of the information falling within the scope of the request at the time of handling, and failed to notify the Applicant that some of the information was published on its website.

However, the Commissioner found that the Ministers were entitled to withhold two of the three documents identified. The Commissioner required the Ministers to disclose the remaining document.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 16(1) (Refusal of request); 25(1) (Information otherwise accessible); 30(b)(ii) (Prejudice to effective conduct of public affairs)

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 4 June 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information request stated:
Please supply the records of the First Minister's overseas meetings with EU officials from May 2016 to December 2019. The records should include what was discussed. Not just dates and names.
2. The Ministers responded on 3 July 2020. They disclosed some information to the Applicant but withheld the remainder under section 32(1)(a)(ii) (International relations) of FOISA.
3. On 6 July 2020, the Applicant wrote to the Ministers requesting a review of their decision on the basis that he believed the information should be disclosed and that the public interest fell in favour of disclosure.
4. The Ministers notified the Applicant of the outcome of their review on 31 July 2020 and upheld their application of section 32(1)(a)(ii) of FOISA explaining that disclosure would, or would be likely to, prejudice substantially relations between the United Kingdom and the European Commission/ European Parliament
5. On 13 September 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because he believed that the public had a right to know what had been said and that the information should be disclosed in the public interest.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 29 September 2020, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer. At this point, the Ministers clarified that they wished to apply section 25(1) of FOISA in respect of information which was otherwise available to the Applicant via website links they had provided him with.
8. 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 and to answer specific questions. These related to why the Ministers believed that section 32(1)(a)(i) was engaged, whether they had sought the views of the parties involved in the discussions and what their public interest arguments were. They were also asked to clarify their application of section 25(1) of FOISA.
9. The Ministers provided their submissions to the investigating officer and added that they now also wished to apply section 30(b)(ii) of FOISA to the information being withheld.
10. They also explained that they had located further information falling within the scope of the request (document 3) and provided a copy of that, along with the copies of the others (documents 1 and 2), to the investigating officer.
11. The Ministers clarified that they had provided the Applicant with website links through which he could access some relevant information. However, they acknowledged that they did not provide him with a formal notice that section 25(1) of FOISA applied to that information, and apologised for this omission.
12. During the course of the investigation, the Ministers submitted that they no longer wished to rely on the exemption at section 32(1)(a)(ii) of FOISA and that they now wished to rely solely on section 30(b)(ii) of FOISA in respect of the information being withheld.

Commissioner's analysis and findings

13. 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 him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Section 32(1)(a)(ii) (International relations)

14. During the investigation, the Ministers withdrew their reliance on section 32(1)(a)(ii) of FOISA. The Commissioner must therefore conclude that the Ministers were not entitled to rely on this exemption in response to the request and requirement for review.

Section 25 of FOISA (Information otherwise accessible)

15. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
16. In response to the initial request, the Ministers provided the Applicant with three annexes of information. In Annex A, the Ministers provided several links to their website, which contained information relevant to the Applicant's request. The Ministers, however, failed to provide the Applicant with a refusal notice under section 16 of FOISA, citing section 25(1) of FOISA, explaining that the information was available to him via these website links.
17. The Ministers acknowledged that they had not provided the Applicant with a formal notice that section 25(1) of FOISA applied to this information, and they apologised for this omission.
18. The Commissioner is satisfied that the information to which the Ministers applied the exemption in section 25(1) of FOISA is information which is reasonably accessible to the Applicant. He is also satisfied that the Ministers supplied sufficient information (in the website links provided) to allow the Applicant to access the information. He is therefore satisfied that the exemption at section 25(1) applies.
19. However, the Commissioner finds that the Ministers failed to comply with section 16 of FOISA by failing to give notice to the Applicant that it was relying on section 25(1) of FOISA in respect of this information.
20. The Commissioner does not require the Ministers to take any action in respect of this failure, but would comment that this caused considerable confusion for the Applicant. He believed that information was being withheld from him when in fact he had been provided with website links to access the information which was already in the public domain.

Section 1(1) of FOISA (General entitlement)

21. The Ministers failed to locate one document falling within the scope of the request (document 3) until after the investigating officer had written to them requesting their submissions in respect of documents 1 and 2. This document was not located during the initial handling of the request.
22. The Ministers therefore failed to identify all of the information falling within the scope of the request until the Commissioner's investigation had begun. This was a breach of section 1(1) of FOISA.
23. The Ministers submitted that all of the First Minister's meetings with EU officials are recorded publicly in the Scottish Government's website¹. They explained that a list of all the First Minister's overseas meetings with EU officials from May 2016 to December 2019 was compiled based on the information held within the relevant sections of the website and from searches on the Scottish Government's electronic document management system (eDRM). Utilising this list, the Ministers conducted further searches based on the surnames of the individuals who held meetings with the First Minister during the time period specified. These searches identified fifteen meetings relevant to this request as set out in the annex to the original response.

¹ [International relations: Ministerial visits and events within Europe - gov.scot \(www.gov.scot\)](http://www.gov.scot)

24. As noted above, one further document (document 3) was only located during the investigation.
25. With the exception of this one document, the searches carried out by the Ministers within their eDRM system, in response to the investigating officer's enquiries, appear to have been reasonable and proportionate, based on the timeframe specified by the request and the surnames of the individuals at the meetings in question. The Commissioner notes that searches of personal email folders were not carried out because all the information is stored on the corporate record in eDRM system. In any case, as the Ministers submitted, given the dates concerned (2016-2019), it was likely that the information had been deleted from personal email folders by the date of this request. The Commissioner is therefore satisfied that, by the end of the investigation, the searches conducted were reasonable and proportionate, to identify all of the information falling within the scope of this request.
26. As all the information was eventually located, the Commissioner does not require the Ministers to take any action in respect of the failure to identify all of the information falling within the scope of this request at the time of handling.

Information outwith scope

27. The Ministers redacted a telephone number contained in the withheld information. Having considered the scope of the request, the Commissioner notes that it asks for notes of meetings, and to include what was discussed, dates and names.
28. He is of the view that the scope of the request does not extend to telephone numbers and, as such, the telephone number in question cannot be said to fall within the scope of the request. Disclosure of telephone numbers would not enhance the Applicant's understanding of the information disclosed to him and the telephone number therefore falls outwith the scope of the request.

Section 30(b)(ii) of FOISA (Prejudice to effective conduct of public affairs)

29. For the Ministers to rely on the exemption in section 30(b)(ii) of FOISA, they must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation.
30. The Commissioner expects public authorities applying this exemption to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly foreseeable) future, not simply that harm is a remote possibility. In addition, the inhibition in question must be, or must be likely to be, substantial. The word "substantial" is important here: the degree of inhibition has to be of real and demonstrable significance.
31. The information being withheld under this exemption comprises parts of documents 1 and 2 and all of document 3.

Submissions from the Ministers

32. The Ministers stated that the meeting between the First Minister and MEPs took place on 29 June 2016 and that several of the MEPs were no longer in post. For that reason, the Ministers did not attempt to contact any of the MEPs to seek their views on disclosure of the information from the meeting note (document 1).
33. In respect of the other meeting notes (documents 2 and 3), regarding the two meetings between the First Minister and Michel Barnier and the European Commission Task Force, the Ministers submitted that at the outset of these discussions both sides had agreed that

their discussions concerning Scotland's devolved interest in the EU-UK negotiations should be treated as confidential. For this reason, the Ministers had not sought the participants' views on disclosure of the information.

34. The Ministers submitted that the withheld information recorded the free and frank exchange of views between the First Minister of Scotland and key interlocutors from the EU Institutions (such as Mr Barnier, the EU's Chief Negotiator, and the former leaders of the political groups in the 2014-2019 European Parliament). These discussions addressed the impacts of the UK's referendum on EU membership and matters pertaining to the EU-UK relationship. They explained that the decision to withhold information was taken in light of a general concern about the sensitivity and confidentiality of exchanges with the European Commission and the European Parliament on Brexit and the EU-UK future relationship negotiations.
35. In document 1, a number of the MEPs at the meeting were expressing their reactions to the outcome of the UK's referendum on EU exit, and speculating on future possibilities. The Ministers stated that these were sensitive matters at the time (in 2016), and that what they had been thinking then remained sensitive, so the individuals involved were unlikely to want to have their views, which were expressed in private, made public, even after the passage of time. The Ministers submitted that, were this information to be disclosed, it would inhibit such discussions in the future: MEPs would be reluctant to engage in a further free and frank exchange of views with Scottish Ministers and officials if they believed that those views were likely to be made public. Such an outcome, the Ministers argued, would not be in the best interests of the people of Scotland either now or in the future.
36. The Ministers went on to state that the meetings between the First Minister and Mr Barnier (documents 2 and 3) had included very frank exchanges about how each party saw the developing situation in relation to specific issues. These discussions were set out in a way that could only happen in a safe space. Revealing the nature of these conversations, even some time later, would reduce the frankness of any subsequent discussions. That, the Ministers explained, was why there was an explicit agreement on confidentiality around these discussions and no expectation that the substance of the discussions would subsequently be disclosed into the public domain.
37. The Ministers emphasised the importance of protecting the private space within which Ministers and senior officials from all parties (the European Commission Task Force, the European Parliament, the UK Government, the Scottish Government and the other devolved administrations of the UK) could discuss the various aspects of the EU-UK future relationship which would be relevant to their interests without fear that their views would be disclosed publicly. To disclose this information would, the Ministers argued, represent a breach of confidence and trust between Scotland and the European Union's institutions. Disclosure of this information would inhibit such discussions in the future because the EU institutions would be reluctant to engage in a further free and frank exchange of views with Scottish Ministers and officials if they believe that those views are likely to be made public. Such an outcome would not be in the best interests of the people of Scotland either now or in the future.
38. Furthermore, as well as potentially prejudicing the prospect of further open dialogue with the EU institutions, disclosure could also potentially lead individual member states and other foreign governments to consider the nature and substance of their contact with the Scottish Government if they believed it likely that information they would reasonably expect to be exchanged on a confidential basis would subsequently be disclosed. They were of the view

that in this respect the act of disclosure could substantially prejudice UK interests internationally if it was seen that material relating to private meetings was likely to be released. Disclosure could, therefore, have far-reaching consequences for the Scottish Government's ability to maintain and build relationships with other governments, and indirectly impact on other aspects of the Scottish Government's work which may involve European or international interests.

39. It was the Ministers' considered view that disclosure of the withheld information would substantially prejudice relations between the UK (including Scotland) and the EU during the ongoing EU-UK negotiations which were at a critical stage. It would also inhibit further free and frank exchanges between Scottish Government Ministers and officials and their counterparts in the EU institutions in relation to the EU-UK future relationship.

Submissions from the Applicant

40. The Applicant submitted that, given that Brexit had now happened, the risk of inhibition may have diminished, and emphasised that the burden of proving that the exemption was on the Ministers.

Commissioner's findings

41. Document 1 is a note of a meeting with a number of MEPs and it does not include information on the meetings with Mr Barnier. As is clear from the sections of the First Minister's passages disclosed to the Applicant, there is a focus on the Scottish Ministers' view that it would be undemocratic for Scotland to be forced to leave the EU. At the date of the information request (June 2020), the UK (including Scotland) had left the EU. While there was still a transitional period until 31 December 2020 to deal with trade issues, etc., the issue of the UK exiting the EU had been determined. The Commissioner therefore finds it hard to understand how disclosure of conversations which took place around four years prior to the information request would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. All deliberation on that topic had, by that stage, been finalised, so he finds it difficult to see why, as was stated by the Ministers, that what the MEPs were thinking at the time of the deliberations remained sensitive at the time of the information request.
42. The Commissioner also notes that there was no stated express agreement of confidentiality in relation to this MEPs meeting (as was the case in relation to the discussions with the EU Commission in respect of documents 2 and 3).
43. In all the circumstances, the Commissioner must therefore conclude that the exemption in section 30(b)(ii) of FOISA does not apply to the withheld information in document 1. He therefore requires the Ministers to disclose this information to the Applicant.
44. Documents 2 and 3 are notes of meetings with the EU Commission on two specified dates. As the Commissioner has noted above, there was an explicit duty of confidentiality in place between the parties involved in these meetings, to the effect that the content of the minute would not be shared publicly. While this does not mean that the information should automatically be treated as exempt under section 30(b)(ii) (the Commissioner notes that Ministers have not applied the exemption in section 36 (Confidentiality) of FOISA), it is a factor to be considered.
45. The Commissioner acknowledges that the meetings were with the EU's chief negotiator on Brexit related issues, Mr Barnier, and that, although Brexit had occurred by the date of the information request, negotiations between the UK and the EU were ongoing.

46. The Commissioner has considered the Ministers' submissions that they, and senior officials from all parties (the European Commission Task Force, the European Parliament, the UK Government, the Scottish Government and the other devolved administrations of the UK) should be able to discuss various aspects of the EU-UK future relationship which are relevant to their interests without fear that their views will be disclosed publicly. He has also taken account of the fact that the subject of both documents 2 and 3 relates to *the detail of Brexit*, not just *whether it takes place or not*.
47. The Commissioner accepts, in all the circumstances of this case, that the officials involved in these discussions did require a private space to discuss matters freely and frankly, without concern that their comments would be made public.
48. As such, the Commissioner accepts that disclosure of the withheld information in documents 2 and 3 would, or have been likely to, inhibited substantially the free and frank exchange of views for the purposes of deliberation, as argued by the Ministers. He is therefore satisfied that the information under consideration here was exempt from disclosure in terms of section 30(b)(ii) of FOISA.
49. He will now go on to consider the application of the public interest test in section 2(1)(b) of FOISA in respect of these two documents.

The public interest

50. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.

The Ministers' submissions

51. The Ministers acknowledged that there was some public interest in the Scottish Government's discussions with the European Commission in relation to the EU-UK negotiations. They also recognised that there was a public interest in disclosing information as part of open, transparent and accountable government. The Ministers were of the view that the disclosure of a small amount of the information which fell within the scope of the request demonstrated that they recognised the public interest in the issue.
52. However, the Ministers felt that there was a greater public interest in ensuring that both the Scottish Government and the UK Government were able to maintain good relations with the European Commission and the European Parliament, in order to protect the UK's ability to negotiate a deal with the EU and the Scottish Government's ability to engage effectively to protect Scotland's interests. They argued that there could be no public interest in jeopardising those relations by the Scottish Government disclosing information of a sensitive nature which was discussed in confidence. The public interest lay in maintaining good relations, based on trust and respect, between the EU institutions and the individual nations which make up the UK, particularly in the light of the significant impact that an agreement (or no agreement) could have on the citizens of Scotland and the UK.
53. The Ministers considered that there was a greater public interest in allowing Scottish Ministers and officials a private space within which to engage in full and frank discussions with the European Commission and the European Parliament. There was no public interest in disclosing information which might damage UK and Scottish interests.

The Applicant's submissions

54. The Applicant argued that there was a general public interest in ensuring transparency and accountability. He stated that the Ministers had not evidenced that the EU had objected to the disclosure of the information.
55. He commented that Brexit and the EU were constitutional and political matters of great importance to the Scottish public. He submitted that the First Minister had said it may be possible for Scotland to remain in both the EU and the UK, even after the triggering of Article 50.
56. The Applicant believed it was in the public interest to learn if, at the meetings, the First Minister was told the chances of Scotland remaining in the EU and what those chances were. He stated that the First Minister had also repeatedly said she could not hold another independence referendum until she knew the facts. It was therefore important for the public to know if the EU told the First Minister whether the chances of Scotland staying in the EU were impossible or unlikely, if the UK continued to exit the EU.
57. Also, the Applicant submitted that the Scottish Government had repeatedly asserted a policy of Open Government and it went against that Open Government policy to conceal matters. He argued that it was in the public interest to know if the First Minister had misled the public regarding whether meetings with the EU contradicted the assertions that she was publicly making about the possibility of Scotland remaining in the EU and UK.

The Commissioner's findings

58. The Commissioner has considered the public interest test arguments put forward by both the Ministers and the Applicant. He recognises the substantial public interest that exists in the matter of the future relationship between Scotland and the EU post-Brexit, and also in reaching an acceptable consensus which takes account of the needs and sensitivities of all parties involved.
59. The Commissioner also accepts that disclosure of the information in the meeting notes would promote accountability and transparency and he recognises the wide public interest in all matters to do with Scotland's future with regards to Europe.
60. When deciding where the public interest lies, the Commissioner must assess the specific circumstances of the case. The timing of the request will also be relevant.
61. As noted above, the Commissioner is satisfied that disclosure of the information would, or would be likely to, inhibit substantially the relationship between the Scottish Government and other relevant parties. While he recognises the public interest in the disclosure of the information, he has concluded, on balance, given the harm which would or would be likely to occur should the information be disclosed, and the timing of the request and request for review, that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(b)(ii) of FOISA.

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 the Applicant.

The Commissioner finds that the Ministers were entitled to withhold information in documents 2 and 3.

However, he finds that the Ministers failed to comply with Part 1 of FOISA by:

- failing to identify all the information within the scope of the request until during the investigation (a breach of section 1(1))
- withholding information in document 1 under the exemption in section 30(b)(ii) of FOISA (a breach of section 1(1)) and
- failing to provide the Applicant with a refusal notice relating to its application of section 25 (a breach of section 16(1)).

The Commissioner requires the Ministers to disclose the withheld information in document 1 to the Applicant, by 7 February 2022

Appeal

Should either the Applicant or the 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.

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

22 December 2021

Appendix 1: 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 –

- (a) the provision does not confer absolute exemption; and
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

- (a) section 25;

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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-

...

(ii) the free and frank exchange of views for the purposes of deliberation; or

...

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