

Decision Notice



Decision 224/2013 Mr David Maddox, the Scotsman and the Scottish Ministers

Correspondence with Scottish sporting bodies/representative bodies

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www.itspublicknowledge.info

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Summary

On 5 August 2012, Mr Maddox asked the Scottish Ministers (the Ministers) for correspondence received from Scottish sporting bodies relating to their views on independence, a referendum and devomax. The Ministers withheld the information in terms of section 30(b)(i) and (ii) of FOISA on the basis that disclosure would (or would be likely to) inhibit substantially the free and frank provision of advice/exchange of views.

During the commissioner's investigation, the Ministers released some information and changed the exemptions relied upon for the remainder to sections 29(1)(a) and 30(c).

The Commissioner found that the Ministers had been entitled to withhold the information as information relating to the formulation of Scottish government policy, the balance of the public interest favouring the information being withheld.

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) (Formulation of Scottish Administration policy)

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 5 August 2012, Mr Maddox wrote to the Ministers requesting the following information:
“ ... all correspondence between Scottish sporting bodies or Scottish sports representative bodies and Shona Robison, the Ministers for Public Health and Sport, or the Scottish Government department she serves in, over the last 12 months regarding the views of those bodies/organisations on independence, a referendum and devomax and the effects on their sports of Scotland being independent.”
2. The Ministers responded on 27 August 2013. They withheld the information in terms of section 30(b)(i) and (ii) of FOISA.



3. On 28 August 2013, Mr Maddox wrote to the Ministers requesting a review of their decision. Mr Maddox argued that there was a stronger public interest in the correspondence being published. He highlighted that these were the thoughts of bodies, many of which received public funding, on an issue of significance to the Scottish people. These thoughts could help influence the outcome of the referendum.
4. The Ministers notified Mr Maddox of the outcome of their review on 27 September 2012. They maintained their reliance on sections 30(b)(i) and (ii) of FOISA and provided further explanation of why they considered these exemptions to apply.
5. On 8 January 2013, Mr Maddox wrote to the Commissioner's office, 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 Maddox 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 15 January 2013, the Ministers were notified in writing that an application had been received from Mr Maddox and 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. The Ministers were asked to justify their reliance on sections 30(b)(i) and (ii) of FOISA and to explain whether or not they had sought consent from the bodies concerned to disclose the information requested.
9. During the investigation the Ministers released two documents to Mr Maddox and changed the exemptions they were applying to withhold the remaining information. The Ministers now submitted that this information was withheld under sections 29(1)(a) and 30(c) of FOISA.
10. Mr Maddox was provided with an opportunity to comment on the application of these exemptions. He remained dissatisfied that the Ministers were seeking to withhold this information.



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

Background to request

12. In February and June 2012, the Minister for Commonwealth Games and Sport wrote to sporting bodies across Scotland inviting them to engage in debate on the future of sport in an independent Scotland. The Ministers received 18 responses to this request, although two of these were submitted by individuals on their own behalf and therefore do not fall within the scope of Mr Maddox's request. The remaining 16 documents constitute the information under consideration in this case.

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

13. Under section 29(1)(a) of FOISA, information held by the Scottish Administration (defined in section 126 of the Scotland Act 1998 as comprising members of the Scottish Executive, junior Scottish Ministers and non-ministerial office holders, with their staff) is exempt if it relates to the formulation or development of government policy. Section 29(4) defines "government policy" as including the policy of the Scottish administration.
14. The Commissioner's view, as expressed in her briefing on the application of section 29(1)¹ is that:
- "formulation" suggests 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; while
- "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.
15. For information to fall under this exemption, it need only relate to the formulation or development of government policy. There is no need to demonstrate harm to either process. The authority has only to consider whether the information falls within the description specified in the exemption when assessing whether it applies.
16. The exemption is subject to the public interest test in section 2(1)(b) of FOISA. More detailed consideration of the content of the information withheld, including its relative sensitivity and the effect of disclosure, is required when carrying out the public interest test.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>



17. The Ministers applied section 29(1)(a) to all of the remaining withheld information. The Ministers stated that the response letters (containing this information) related to the formulation and development of Scottish Government policy on the future of sport and physical activity in an independent Scotland. They considered this to be an important part of the Government's wider keynote policy on constitutional reform. The Ministers stated that the process of formulating and developing the relevant policy was still at an early stage and Ministers had not yet reached any firm conclusions.
18. The Ministers stated that this consultation with Scottish sporting bodies was only an informal consultation to start the debate and obtain some initial views on certain questions. The Ministers stated that further public consultation will take place as the policy process moves forward.
19. Mr Maddox did not accept the Ministers' reliance on section 29(1)(a) of FOISA to withhold this information. He argued that his request was not about future policy formation, but about correspondence with sports bodies and their representatives asking for their views on independence.

The Commissioner's conclusions – application of the exemption

20. The Commissioner notes that these representations from Scottish sporting bodies were provided as a result of a consultation letter issued by the Minister for Commonwealth Games and Sport on 28 February 2012, followed up by a reminder on 14 June 2012. The 28 February letter (disclosed to Mr Maddox during the investigation) states:
"I am taking this opportunity to contact you to begin what I hope will be an informative, enlightening and constructive debate as to the vision we all have for sport and physical activity in the future, including what that might mean in an independent Scotland."
21. Attached to this letter was a series of questions, relating to the future of sport and physical activity in Scotland and the implications of independence, which each sporting body was invited to respond to.
22. 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.
23. Having considered the remaining withheld information and the circumstances in which it was provided to the Ministers, the Commissioner accepts that all of this information is information which relates to the formulation of government policy, and therefore that it falls within the scope of the exemption in section 29(1)(a) of FOISA.
24. As indicated above, 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.



Public interest test- submissions from the Ministers

25. The Ministers recognised some public interest in disclosure as part of open, transparent and accountable government, and to inform public debate on their developing proposals for independence. They believed this public interest was largely met by the significant quantity of robust and detailed information on constitutional proposals already in the public domain on the Scottish Government's own websites (e.g. www.scotreferendum.com and www.scotland.gov.uk). These resources, the Ministers explained, were intended to be supplemented by a series of thematic papers covering the main arguments in favour of their policy proposals for independence, to be published in the lead up to the referendum.
26. At the time the Ministers dealt with Mr Maddox's request and requirement for review, they considered there to be a vital public interest in protecting a private space within which Ministers could explore, debate rigorously and refine the full range of policy options available. This would enable them to understand the possible implications of these options, informed by the full and honest, expert advice of key stakeholders, particularly the Scottish sporting bodies, before reaching a settled view. The Ministers considered this particularly important in the current situation, where the policy on sport was intended to form part of a package of proposals on constitutional change, with complex and far-reaching implications for the future of Scotland.
27. The Ministers argued that timing was also a critical public interest consideration in this case. With Scotland hosting major high-profile sporting events (the Commonwealth Games and the Ryder Cup) in 2014, issues relating to sport would attract even more media attention than usual. This, the Ministers submitted, could result in undue attention and significance being given to these early discussions, with misleading conclusions being drawn, before a fully considered policy position could be reached. They considered it likely that this would both damage the policy development process, and be an unwelcome and unhelpful distraction before and during these major sporting events, which would not be in the public interest.
28. The Ministers also considered it to be the expectation of the sporting bodies themselves that their views would be treated in confidence by the Ministers, referring to discussions with the bodies during the consultation process, the second invitation to provide comments and views expressed by certain of the sports bodies in the context of Mr Maddox's request.

The public interest – Mr Maddox's views

29. Mr Maddox identified a strong public interest in publishing these views, on the basis that it would help inform the debate ahead of the referendum. He highlighted that the Scottish Government itself was asking the UK Government to publish material for the same reason.
30. Mr Maddox did not consider it unreasonable to know what policy was being formulated for an independent Scotland. He believed the 2014 sporting events highlighted by the Ministers made disclosure of these documents more important, given that (in his view) the Ministers intended to use them as a platform for the independence debate.

The public interest – the Commissioner's conclusions



31. The withheld information under consideration in this case comprises contributions made by a variety of Scottish sporting bodies, in response to the Minister's questions on the future development of Scottish sport and its organisation in an independent Scotland.
32. The Commissioner accepts that there is a considerable public interest in knowing the position of Scotland's sporting bodies on these issues. Sport is important to many people in Scotland. The Ministers acknowledge that policy is being developed in this area. They acknowledge that disclosure of the views expressed would contribute to openness and accountability, by assisting the public to understand the context in which the relevant policy decisions are being made and make effective contributions to the debate.
33. The Commissioner recognises that it is in the public interest allowing all options to be identified, explored and considered freely by the Ministers, before reaching a settled public view. In this regard, she notes that the policy formulation in question was at a relatively early stage throughout the time the Ministers were dealing with Mr Maddox. While some of the Ministers' submissions on wider harm from disclosure were, in her view, overstated, the Commissioner has also taken account of the context within which these views were provided to the Ministers. She notes that this was not an open public consultation and the consultees appear to have been given assurances by the Minister (which might not be appropriate in all circumstances, but nonetheless were given here) that led to an expectation that their responses would be treated in confidence.
34. The Commissioner has weighed the public interest considerations, taking account of all the circumstances of this case, including the timing of Mr Maddox's request and requirement for review. On balance, she has concluded that disclosure of the remaining withheld information, at the time of the Ministers' review (when formulation of the relevant policy was still at a relatively early stage), would have been likely to prejudice the policy-making process significantly. In all the circumstances, the Commissioner acknowledges the risk that the views expressed in these documents may not have been provided had disclosure at that stage been expected. As the process of policy formulation and development moves on, that position might well change.
35. The Commissioner concludes, in all the circumstances of this case, that the public interest in disclosure of the remaining withheld information under consideration is outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA. Consequently, the Ministers were entitled to withhold the information under that exemption.
36. Having reached this conclusion, the Commissioner is not required to consider any of the other exemptions cited by the Ministers in this case.
37. The Commissioner would urge the Ministers to consider what assurances they give to consultees in the future, in light of FOISA, and that they explain the position clearly to those affected.



DECISION

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

Appeal

Should either Mr Maddox 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.

Rosemary Agnew
Scottish Information Commissioner
8 October 2013



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;

...

- (4) In this section-

“government policy” means-

- (a) the policy of the Scottish Administration; and

...