

# Decision Notice

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## Decision 253/2016: Mr Kieron Higgins and the Scottish Ministers

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### Labour's proposal on restoring money lost through tax credit cuts

Reference No: 201600929

Decision Date: 25 November 2016



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for information about Scottish Labour's proposal to restore the money lost from potential cuts to tax credits. The Ministers disclosed some information, but withheld other information under exemptions relating to the formulation of Scottish Government policy and prejudice to the effective conduct of public affairs.

The Commissioner did not agree that all of the withheld information was exempt and ordered the Ministers to disclose information from one document.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) (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

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1. On 15 February 2016, Mr Higgins made a request for information to the Ministers. The information requested was:  
  
...all internal correspondence, communications, memos and briefings regarding Scottish Labour's proposal to restore the money lost from potential cuts to tax credits between the dates of 30/10/2015 and 6/11/2015, between Scottish Ministers, Civil servants, External agencies and Special Advisors.
2. The Ministers responded on 16 March 2016. They notified Mr Higgins that they were withholding all of the information he had requested as they considered it to be exempt from disclosure under section 30(b) of FOISA.
3. On the same date, Mr Higgins wrote to the Ministers requesting a review of their decision. He stated: "Given the significant public interest in the new powers being devolved to the Scottish Parliament, there is a clear public interest to release the information to understand what discussions and decisions took place regarding the scope of the Scotland Bill at various stages of the parliamentary process".
4. The Ministers notified Mr Higgins of the outcome of their review on 14 April 2016. They provided some information, but maintained that the remainder was exempt under section 30(b) of FOISA. They stated that some information was also exempt under section 29(1)(a) and section 36(1) of FOISA.
5. On 16 May 2016, Mr Higgins applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Higgins stated he was dissatisfied with the outcome of the Ministers' review because there was a clear public interest in disclosure.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Mr Higgins 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.
7. On 23 June 2016, the Ministers were notified in writing that Mr Higgins had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Higgins. The Ministers provided the information and the case was allocated to an investigating officer.
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 answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

## Commissioner's analysis and findings

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

### Withheld information

10. The Ministers have identified fifteen documents that contain information falling within the scope of Mr Higgins' request.
  - (i) Information contained in documents 1 and 9 is withheld under section 29(1)(a) of FOISA.
  - (ii) Information contained in documents 1, 2, 4, 5, 6, 7, Annex D of document 8, 9, 10, 11, 13, 14 and 15 is withheld under section 30(b)(i) of FOISA.
  - (iii) Information contained in document 3 is withheld under section 30(b)(ii) of FOISA.
11. During the investigation, the Ministers decided they no longer wanted to rely on section 36(1) of FOISA to withhold information.

### Scope of the request

12. In his initial request, Mr Higgins asked for correspondence between specific parties regarding Scottish Labour's proposal to restore the money lost from potential cuts to tax credits. In his request for review, Mr Higgins appeared to diverge from the scope of his initial request by suggesting that he wanted the information to "understand what discussions and decisions took place regarding the scope of the Scotland Bill at various stages of the parliamentary process".
13. In correspondence with the Commissioner, the Ministers referred to these comments made by Mr Higgins in his request for review, and argued that these statements have no relevance to his initial request. The Ministers believed that Mr Higgins' request had evolved from a request for information discussing Scottish Labour's proposals to one seeking all information regarding the discussions around the scope of the Scotland Bill. The Ministers argued that the arguments put forward by Mr Higgins in his request for review and his appeal to the Commissioner were not relevant to, or within, the scope of his initial request.

14. The Commissioner notes the Ministers' comments. She agrees that Mr Higgins' request for review raises points which are not relevant to the information that falls within the scope of his initial request, while recording his dissatisfaction with the Ministers' response to his request. However, when Mr Higgins made his information request, he did not know what information would be held by the Ministers. Mr Higgins has since indicated that he expected discussions about the powers in the Scotland Bill to feature in correspondence between Ministers and officials who were discussing Scottish Labour's proposal to top-up tax credits.

### **Document 8 – parts within scope**

15. The Ministers submitted that only part of document 8 (Annex D) fell within the scope of Mr Higgins' information request. However, during the investigation the Commissioner told the Ministers that, in her view, Annexes A, B and C of document 8 were also within the scope of Mr Higgins' request.
16. The Ministers advised the Commissioner that Mr Higgins had already been provided with Annex A, and that the information contained in Annexes B and C was available online within the full transcript of a parliamentary debate on Scottish Labour's motion. The Ministers subsequently contacted Mr Higgins and provided him with a link to a full transcript of the parliamentary debate.
17. The Commissioner reviewed the transcript of the parliamentary debate but she did not accept that the entirety of Annexes B and C (which comprise opening and closing speeches) were contained within it. This point was raised with the Ministers, who provided Mr Higgins with copies of Annexes B and C.
18. As the Commissioner is now satisfied that Mr Higgins has been given access to the information contained in Annexes A, B and C of document 8, she will consider only Annex D of document 8 in this Decision Notice.

### **Section 30(b)(i) of FOISA – the free and frank provision of advice**

19. The Ministers withheld information in documents 1, 2, 4, 5, 6, 7, Annex D of document 8, 9, 10, 11, 13, 14 and 15 under section 30(b)(i) of FOISA.
20. In order for the Ministers to rely on this exemption, they must show that disclosure of the information would (or would be likely to) inhibit substantially the free and frank provision of advice. The exemption is subject to the public interest test in section 2(1)(b) of FOISA.
21. In applying the exemption, the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. The inhibition in question must be substantial and therefore of real and demonstrable significance.
22. The Ministers provided focused arguments on the specific information they were withholding in each document, explaining in each case why the exemption applied. These arguments are not replicated in full, as to do so would have the effect of disclosing some of the information, but are summarised below.
23. The Ministers submitted that the information being withheld either contains a request for advice or the provision of advice. They argued that it is necessary to be able to frame a request for advice freely and frankly to ensure the response received provides full and considered responses.

24. The Ministers argued that if the information was disclosed, it would pose a significant risk that officials would come under political or public pressure not to challenge ideas or to limit their considerations to the popular choices when providing advice to Ministers or in formulating policy. If this happened, they believed that it would lead to the significant inhibition of policy debate and discussions. This would lead to poorer decision making in Government and restrict the development of options in Ministers' and officials' considerations of the merits and demerits of responses proposed in this case. The Ministers maintained that this could substantially inhibit the consideration of any option not likely to be favoured by the public or that could be interpreted as having a political reason for or against implementation.
25. The Commissioner accepts that Ministers need to be able to ask for, and receive, candid advice from their officials, to obtain a full understanding of all of the issues that could be relevant in any given case, whether they are politically acceptable or not. If officials felt unable to respond candidly to requests for advice, it is arguable that Ministers may make policy decisions based only on the advice that officials were happy to disclose publicly, rather than on all of the advice that was available. She accepts that this would have a negative impact on the business of government. The question for the Commissioner is whether this is likely to be the consequence of disclosing the information covered by Mr Higgins' request.
26. The Commissioner has reviewed all of the information that the Ministers are withholding under section 30(b)(i) of FOISA, and she considers that all of it falls under the scope of the exemption, apart from the information being withheld in document 4. The Commissioner is satisfied that public disclosure of the information (other than that contained in document 4) would, or would be likely to, inhibit substantially the ability of Ministers and officials to provide advice freely and frankly. The information encompasses the candid views of Ministers and officials on a matter of developing policy. The Commissioner accepts that these views may not have been expressed the same way if the authors had considered that public disclosure was likely, and considers that disclosure of the information in response to Mr Higgins' request would be likely to inhibit officials from providing similarly candid opinions in similar situations.
27. The Ministers have argued that the information withheld in document 4 comprises advice which was necessary to enable Ministers and officials to understand and support arguments regarding Scottish Labour's proposals. The Commissioner is not persuaded by these arguments. The information appears to be essentially an administrative update. She does not accept that its disclosure would cause the harm anticipated by the Ministers. Consequently, the Commissioner does not accept that the information withheld in document 4 falls under the exemption contained in section 30(b)(i) of FOISA. As this information has not been withheld under any other exemption, the Commissioner requires the Ministers to disclose the information withheld in document 4 to Mr Higgins.
28. Where the Commissioner has concluded that the withheld information does fall under section 30(b)(i) of FOISA, she must now go on to consider the application of the public interest test, as set out in section 2(1)(b). Before the information can be withheld, the Commissioner must be satisfied that the public interest in maintaining the exemption outweighs that in disclosing the information.

#### *Public interest test*

29. 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

30. In their submissions to the Commissioner, the Ministers recognised that there was a public interest in disclosure of the information requested by Mr Higgins as part of an open, transparent and accountable government, especially as it relates to a topical subject and a reserved issue. However, the Ministers argued that the public interest in disclosure is significantly outweighed by the public interest in allowing Ministers and officials private space to provide free and frank advice to inform the policy direction of the Scottish Government, and allowing them to consider all options and issues arising without curtailment or political or public pressure on the decision making process.
31. The Ministers submitted that there is a strong public interest in maintaining the integrity of the process of the provision of free and frank advice in the development of policy responses to arising situations, without the fear that disclosure would limit discussions and provision of advice and result in information being taken out of context or being subject to undue pressures from political or public spheres. They argued that there can be no public interest in disclosure of advice provided to Ministers and officials as that disclosure would be significantly likely to result in officials being considerably less willing to provide or request advice if their free and frank consideration of the issues were to be released into the public domain.

### Mr Higgins' submissions

32. Mr Higgins noted that the Scottish Government's public response to the Scottish Labour party's tax credits policy was that the then Scotland Bill did not allow it to reimburse cuts to tax credits. Mr Higgins indicated that this was not the case, and he argued that there was a strong public interest in obtaining information that would explain why the Scottish Government was wrong on a key policy issue of such significance. Mr Higgins asserted that there is significant public interest in the new powers being devolved to the Scottish Parliament under the Scotland Bill, and that there is a clear public interest in disclosing information to understand what discussions and decisions took place regarding the scope of the Scotland Bill at various stages of the parliamentary process.

### Commissioner's conclusions

33. The Commissioner has considered the public interest arguments put forward by both the Ministers and Mr Higgins.
34. The Commissioner acknowledges that there is a public interest in knowing what conversations took place between government officials and Ministers regarding the proposal to top up tax credits. Disclosure would reveal the type of advice sought and provided by Ministers and officials on a topic that is not only of great interest to the public but which could have a financial impact on many thousands of people living in Scotland. Transparency would enable the public to understand how the Ministers responded to the proposal put forward by Scottish Labour and how they reached the view they did.
35. The Commissioner does not accept that it will never be in the public interest to disclose advice provided to Ministers, as argued by the Ministers. The decision on whether it is in the public interest to disclose advice must be assessed in relation to the specific circumstances of the case on each occasion.
36. However, in this case, the Commissioner accepts that the public interest in maintaining the exemption outweighs the public interest in disclosure. She accepts that the prospect of disclosing such advice at the time of Mr Higgins' request was likely to have been detrimental

to informed decision making, and she agrees with the Ministers that the public interest lay in avoiding such an outcome.

37. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information was outweighed by that in maintaining the exemption in section 30(b)(i) of FOISA. Consequently, she is satisfied that the Ministers were correct in withholding the information under this exemption.
38. As the Commissioner has found the information contained in documents 1 and 9 to be exempt from disclosure under section 30(b)(i) of FOISA, she will not go on to consider whether it is also exempt under section 29(1)(a) of FOISA.

### **Section 30(b)(ii) of FOISA – the free and frank exchange of views**

39. The Ministers withheld parts of document 3 under section 30(b)(ii) of FOISA.
40. In order for the Ministers to rely on this exemption, 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.
41. The Commissioner expects authorities to be able to demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. The harm in question should take the form of substantial inhibition from expressing views in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will be, or is likely to be, inhibited in expressing themselves has to be of some real and demonstrable significance,
42. The Ministers explained that they have already disclosed most of the information contained in document 3 to Mr Higgins. The Ministers noted that the redacted information contains an individual official's personal speculation on the actions of third parties, on the topic of tax credit cuts. The Ministers argued that the official was sharing their own views, and that disclosure of information, which they described as "limited sentences", would substantially inhibit the sharing of free and frank views for the purposes of deliberation. The Ministers argued that disclosure would be highly likely to discourage officials from sharing their own considerations and this would substantially inhibit officials' ability to provide free and frank views and ideas for consideration in developing the Scottish Government's response to other political parties' proposals.
43. In assessing whether the exemption in section 30(b)(ii) of FOISA is engaged, the chief consideration is whether the disclosure of the information would, or would be likely to, inhibit substantially the future exchange of views.
44. Each request must be considered on a case-by-case basis, taking into account the effects anticipated from the disclosure of the particular information involved. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression and whether the timing of disclosure would have any bearing.
45. The Commissioner has reviewed the information being withheld under section 30(b)(ii) of FOISA. The Commissioner accepts that, in the circumstances of this case, officials required a private space to discuss matters freely and frankly, without the concern that such comments would be made public. Given the nature of the comments and the circumstances

in which they were made, she accepts that their disclosure would be likely to stifle the frankness and candour of comments made by officials on similarly sensitive issues in future.

46. The Commissioner is satisfied that the exemption in section 30(b)(ii) of FOISA applies to all of the information in document 3 withheld under that exemption.

#### *Public interest test*

47. The exemption in section 30(b)(ii) is subject to the public interest test required by section 2(1)(b) of FOISA. Where this exemption applies, the Commissioner must 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 Ministers' public interest arguments

48. The Ministers argued that the topic under consideration is a current and politically sensitive issue and disclosure would post a significant risk to officials coming under political or public pressure not to challenge ideas or to limit their considerations in evaluating proposals from other political parties. The Ministers submitted that this would lead to the significant inhibition of policy debate and discussion and to poorer decision making in Government. Without the ability to have free and frank discussions, it would be impossible for Ministers to consider, agree and implement policies or their responses to proposals within government.
49. The Ministers recognised the public interest in disclosure of this information as part of an open, transparent and accountable government, especially as this is a topical subject and also a reserved issue. However, the Ministers considered that there is a strong public interest in maintaining the integrity of the process of setting down free and frank views for the purposes of deliberation. They contended that officials need to be able to debate options rigorously to understand their possible implications, without the fear of premature disclosure which might limit discussion and the development of better options. The Ministers submitted that officials' candour in doing so will be affected by their assessment of whether the content of their discussions will be disclosed in the near future, especially when it may undermine or constrain policy which is still under discussion and development.
50. The Ministers maintained that the public interest in disclosure is significantly outweighed by a greater public interest in allowing Ministers and officials private space to provide free and frank views to inform the policy direction of the Scottish Government without fear that disclosure would compromise their ability to consider all options or issues arising without curtailment or political or public pressure on the decision making process.

#### Mr Higgins' public interest arguments

51. Mr Higgins argued that there is a strong public interest in disclosing this information to understand what discussions and decisions took place regarding the scope of the Scotland Bill at various stages of the parliamentary process.

#### Commissioner's conclusions

52. The Commissioner recognises that there is always a public interest in transparency and accountability and in enabling scrutiny of the decisions, and decision making processes, followed by public authorities. Information regarding the Scottish Government's policy on tax credits is clearly of public importance, given its potential impact on many thousands of people living in Scotland.
53. Mr Higgins has explained that the proposed tax credit cuts were debated in the Scottish Parliament on 4 November 2015. During this debate, the Scottish Government changed its



position from arguing that tax credit top ups could not happen (within the current constraints of the Scotland Bill) to accepting that they could. Mr Higgins understands that the Scottish Government suggested that this “change of position” was because of amendments tabled to the Scotland Bill, but he considers that Ministers would have had prior sight of these amendments a few days before the debate took place. Mr Higgins has argued that it is in the public interest to understand what discussions and decisions took place regarding the scope of the Scotland Bill at various stages of the parliamentary process.

54. The Commissioner has considered the arguments put forward by Mr Higgins, but she finds that they are not relevant to the information being withheld in this case. The withheld information does not refer to or discuss the Scotland Bill, or the powers it would give the Scottish Government, in any way. Given this, it is difficult to see how Mr Higgins’ public interest arguments can overcome the strong, competing, public interest in allowing Ministers and officials to share opinions and views candidly when developing or evaluating policy options. The Commissioner has already concluded that disclosure of the information would be likely to substantially inhibit individuals from expressing their opinions and views. She considers that such inhibition would hamper future policy and decision making within the Scottish Government and would be contrary to the public interest. The Commissioner therefore finds that the public interest in disclosure of this information is outweighed by that in favour of maintaining the exemption contained in section 30(b)(ii) of FOISA.
55. Accordingly, the Commissioner has concluded that the Ministers were entitled to withhold the information contained in document 3 in terms of section 30(b)(ii) of FOISA.

## Decision

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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 Higgins.

The Commissioner finds that, for the most part, the Ministers were entitled to withhold information under section 30(b)(i) and (ii) of FOISA.

However, by wrongly withholding information from document 4 under section 30(b)(i) of FOISA, the Ministers failed to comply with Part 1.

The Commissioner therefore requires the Ministers to disclose document 4 to Mr Higgins by Friday 13 January 2017.

## **Appeal**

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Should either Mr Higgins 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.

## **Enforcement**

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If the Scottish Ministers (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.

**Rosemary Agnew**  
**Scottish Information Commissioner**

**25 November 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.

...

#### 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-
- (i) the free and frank provision of advice; or
  - (ii) the free and frank exchange of views for the purposes of deliberation; or

...

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