

# Decision Notice



Decision 130/2008 Mr Tom Gordon and the Scottish Ministers

Annex B of Choosing Scotland's Future; a Draft Referendum (Scotland) Bill

Reference No: 200800138  
Decision Date: 2 October 2008

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**Kevin Dunion**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

Mr Tom Gordon requested all records held in relation to Annex B of Choosing Scotland's Future, a Draft Referendum (Scotland) Bill from the Scottish Ministers (the Ministers). The Ministers responded by informing Mr Gordon that the information he sought was exempt under FOISA. Following a review, Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Gordon's request for information in accordance with Part 1 of FOISA, on the basis that it was exempt under section 29(1)(a) of FOISA.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 29(1)(a), (2)(a), (3) and (4) (Formulation of Scottish Administration policy etc.)

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

## Background

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1. On 4 September 2007, Mr Gordon wrote to the Ministers requesting the following information:  
“...a copy of all records held by the Scottish Executive [the Ministers] in relation to Annex B of choosing Scotland's Future, a Draft Referendum (Scotland) Bill. This should include, but not be limited to, all drafts of Annex B and email and other correspondence associated with that drafting, and legal research on the legislative competence of the draft bill in Annex B.”
2. The Ministers responded on 18 October 2007. The Ministers refused to supply the information on the basis that it was exempt in terms of sections 29(1)(a) and (b) (Formulation of Scottish Administration policy etc.); 30(b) and (c) (Prejudice to effective conduct of public affairs) and 36(1) (Confidentiality) of FOISA.



3. On 23 October 2007, Mr Gordon wrote to the Ministers requesting a review of their decision. Mr Gordon was concerned that the Ministers had applied the exemptions disproportionately and in a blanket fashion. Mr Gordon also asked the Ministers to reconsider whether the exemptions could reasonably be applied to material which he did not consider to be actual government policy, given that the draft Bill at Annex B is, according to the document "Choosing Scotland's Future" (see paragraph 13 below), illustrative and not yet a published government bill.
4. The Ministers notified Mr Gordon of the outcome of their review on 11 December 2007. The Ministers upheld their original response to Mr Gordon without amendment.
5. On 29 January 2008, Mr Gordon wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Gordon had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 1 February 2008, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with any information withheld from Mr Gordon. 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, providing them with 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. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. In their submissions, the Ministers supplied a schedule of documents which detailed the information withheld from Mr Gordon. This schedule specified that a number of documents were being withheld by the Ministers under section 25 of FOISA. The investigating officer sought confirmation that Mr Gordon had been provided with details as how to access these particular documents. Within their submissions the Ministers also indicated that they were willing to release further documents which were previously withheld from Mr Gordon.
10. Subsequently, the Ministers confirmed that they had released further information to Mr Gordon and supplied him with hard copies of the information which they previously considered exempt under section 25 on 4 July 2008. As a result, this information is not considered further in this decision notice.



## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all the information and the submissions presented to him by both Mr Gordon and the Ministers. The Commissioner is satisfied that no matter of relevance has been overlooked.

### Background

12. In 2005, the Scottish National Party published "Raising the Standard", a consultation paper on independence. That paper developed the arguments for an independent Scotland, and was followed by a paper laying out the results of the responses to the paper, and a draft Bill for an independence referendum.
13. Following a change in administration, "Choosing Scotland's Future - A National Conversation" ("the White Paper") was published in August 2007. This publication describes the basis for a National Conversation about Scotland's constitutional future, describing the current set up of the Scottish Parliament, exploring where further devolution may be possible and the steps needed for independence. Annex B of this document contains a draft Bill to illustrate the form that the legislation may take for a referendum. Mr Gordon's request encompasses documents which relate to this particular Annex.
14. Within his submissions to the Commissioner, Mr Gordon stated that he did not believe that the information withheld by the Ministers was government policy, but related to an "illustrative" Bill of the kind previously published by the SNP while in opposition.
15. The Ministers applied the exemption in section 29(1)(a) to all of the information withheld from Mr Gordon. This exemption will therefore be considered first.

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

16. In terms of 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. This is a qualified exemption, which means that even if the exemption applies, it is subject to the public interest test required by section 2(1)(b) of FOISA.
17. For information to fall under the exemption in section 29(1)(a), it must *relate to* government policy. The Commissioner considers that this can be defined as the development of options and priorities for the Scottish Ministers, who will subsequently determine which options should be translated into political action and when. The formulation of government policy suggests the early stages of the policy process where options are considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers. Development suggests the processes involved in improving upon or amending already existing policy and could involve the piloting, monitoring, reviewing, analysing or recording the effects of existing policy.



18. As noted above, the Ministers have applied section 29(1)(a) of FOISA to all of the documents withheld, on the basis that they all relate to the ongoing formulation and development of government policy on an independence referendum, which, they submit, is a crucial part of the Scottish Government's wider policy on constitutional change, as discussed in the White Paper.
19. Documents 1 to 18 are discussions about the formulation and development of policy on a referendum, including the drafting of the relevant chapter of the White Paper and the draft Referendum Bill. During the investigation, the Ministers disclosed documents 2 and 10 to Mr Gordon as they considered, on reflection, that the balance of public interest favoured disclosure. As a result, these documents are not considered further in this decision notice.
20. Documents 19-44 consist of 26 drafts of the referendum chapter of the White Paper. Documents 30-44 include a copy of the draft Bill. The Ministers submitted that these drafts show the evolution of thinking about policy on the referendum throughout the drafting of the White Paper.
21. The Commissioner considers that, despite the draft Bill contained within Annex B being described as "illustrative" and having been published in the final paper, the broad, all encompassing nature of section 29(1)(a) means that these documents fall within the scope of exemption as they relate to the wider policy issue of Scotland's constitutional future. The Commissioner agrees that this is the case and is therefore satisfied that the 26 drafts (documents 19-44) relate to the development of government policy and consequently fall within the scope of section 29(1)(a) of FOISA.
22. The Commissioner is also satisfied that documents 1, 3-6, 9, 11-18 reflect discussions which relate to the formulation of policy and therefore also fall within the scope of section 29(1)(a) of FOISA.
23. A public authority relying on section 29(1)(a) must also take into account section 29(2)(a) and section 29(3). Section 29(2)(a) of FOISA states that once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of a policy decision is not to be regarded as relating to the formulation or development of the policy in question. This information should therefore be released upon request unless an alternative exemption applies.
24. The Commissioner is satisfied that the Ministers' policy formulation on constitutional change was ongoing at the time of Mr Gordon's request. Although the White Paper was published in August 2007, the Commissioner does not consider that the publication can be viewed as the end of policy development on this issue; it is clear that this is an area where further work to formulate and develop the policy will continue. As such, the Commissioner considers that section 29(2)(a) does not apply in this instance.
25. As noted above, section 29(1)(a) is a qualified exemption, which means that even if the exemption applies, the application of this exemption is subject to the public interest test required by section 2(1)(b) of FOISA.



## The public interest test

26. Having concluded that the information withheld 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 disclosure of the information is outweighed by the public interest in maintaining the exemption. Where the two are evenly balanced, the information should be disclosed.
27. As stated above, information is exempt by virtue of section 29(1)(a) if it falls into a particular class of documents; that is where the information relates to the formulation or development of government policy. In considering the application of this exemption, the authority is not required to consider the significance of the content of the information nor the effect of disclosure. The information will be covered by this exemption simply if it relates to the development of government policy regardless of how routine or insignificant the information may be.
28. An assessment of the public interest must be made independently of whether the information falls within the description set out in section 29(1)(a).
29. The Ministers recognised that many members of the public will be interested in the possibility of a referendum on independence, and so acknowledge the public interest in releasing information about the drafting of the Referendum (Scotland) Bill. However, the Ministers believe that there is a much greater public interest in maintaining the exemption; the “national conversation” is still ongoing and releasing discussions and drafts of the White Paper could undermine the policy position as set out in that paper and give the public a misleading perception of the government’s actual policy. The Ministers believe that debate would likely to be diverted from the substance of the White Paper on to legal technicalities, which are for the Scottish Government and Scottish Parliament to resolve, if the outcome of the national conversation is that a referendum should be held.
30. The Ministers also highlighted that, as this is still very much an ongoing area of policy development, the Government must be given the space to develop and formulate views and policies without fear that their deliberations will be released which could close off discussions on some options. They submitted that they need to be free to discuss options among themselves and their 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, as in this case, it may undermine or constrain the Government’s view on an issue that is ongoing.
31. The Ministers also believe there is a strong public interest in preserving some private space in which the Government can formulate and develop policy. They indicate that Ministers and officials need to be free to deliberate openly and frankly, to enable the full exploration of all possible solutions, including those proposals which may not be broadly politically acceptable.
32. Within their submissions, the Ministers concluded that there is nothing in the withheld information appears to be of such significance that its release would lead to off-setting benefit in terms of greater knowledge and understanding.



33. In the Commissioner's view it should be clear by now that this exemption does not allow a general conclusion that Ministers are to be given a private space in which to formulate or develop policy, free from the prospect of information relating to such activity being released. Rather, the requirement is to consider what would be the effect of the release of the specific information in question and whether, on balance, the public interest in disclosing all or part of the information would be outweighed by that in maintaining the exemption.
34. The Commissioner has looked at the information which has been withheld. It reflects the fact that the (then) new Government had set out its policy intention. It then fell to a group of individuals within Government to initiate and refine the process for carrying the intention into effect. This involves an initial draft being circulated with an indication of where input from others is required or with options indicated. In response, others suggest alternatives, point out weaknesses or correct errors. Subsequent drafts are then subject to further scrutiny and comment.
35. The Commissioner is satisfied that the drafts involve amendments, alterations and comments, the disclosure of which could significantly harm the candour with which such amendments or comments are made in future. The Commissioner accepts that amendments to the text even where these only involve the deletion or inclusion of a word or phrase may, on occasion, reflect a significant change in policy.
36. The Commissioner accepts that documents 16, 19-44 represent the formulation of policy in the purest form; that is, the actual drafts of the discussion document and the Referendum Bill. The remaining documents represent email exchanges which comment on or feed into the drafting of these documents.
37. The Commissioner has also recognised that the timing of the request may be pertinent to the successful application of section 29(1)(a). The Commissioner has taken into account the fact that Mr Gordon's request was made in amidst the "National Conversation" on this topic, where a Referendum Bill is an possible outcome from the discussions.
38. Notwithstanding that there has been an important outcome within this process in the publication of the White Paper, it is clear that this was a live and sensitive policy issue at the time of Mr Gordon's request. Disclosure of the information would be likely to have inhibited the observations and further development of options from those involved and, given the range of interests, this would have a negative impact on the quality and efficiency of policy making. The greater the degree of impact, the less it is in the public interest to disclose. In this case the Commissioner concludes that the impact would be considerable.
39. However, the Commissioner accepts that this needs to be balanced against the public benefit from disclosure. Inherently, FOISA acknowledges that there is a public interest in disclosure of information held by authorities. Specifically in this case, release of the information in question would give a deeper insight into the issues and options surrounding a Referendum Bill and would trigger further public debate. In that respect there would be a public interest in disclosure. That said, there is nothing in the information which can be said to be strongly in the public interest to know even if disclosure would have the anticipated detrimental effect on the development of policy.



40. A final policy decision has yet to be taken in relation to the Referendum Bill and the Commissioner is satisfied that the public interest lies in allowing a full exploration of the variety options available during the period of 'National Conversation'. The Commissioner is therefore satisfied that the public interest in maintaining this exemption outweighs that in disclosure at the time of Mr Gordon's request.
41. However, section 29(3) provides that in applying the public interest test in relation to information covered by this exemption, the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or intended to be used, to provide an informed background to the taking of a decision. "Factual" information is generally to be distinguished from advice, opinions, recommendations and internal discussions.
42. Having considered the information in detail, the Commissioner is satisfied that the limited factual material contained within the withheld documentation is conveyed in the final publication, which is publicly accessible.
43. In conclusion, the Commissioner is satisfied that the Ministers were correct in their application of section 29(1)(a) to documents 1,3-6, 9, 11-44 in responding to Mr Gordon's request. Consequently the Commissioner is not required to go and consider the other exemptions cited by the Ministers.

## DECISION

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

## Appeal

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Should either Mr Gordon 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**2 October 2008**





## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12, and 14

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 29 Formulation of Scottish Administration policy etc.

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

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

...

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

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

...



(3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.

(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;

"the Law Officers" means the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland;

"Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

"Ministerial private office" means any part of the Scottish Administration which provides personal administrative support to a Minister.