

Decision Notice



Decision 002/2011 Mr Steven Vass of the Sunday Herald and the Scottish Ministers

Future Funding of Scottish Water

Reference No: 201000844
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www.itspublicknowledge.info

Kevin Dunion

Scottish Information Commissioner

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



Summary

Mr Vass requested from the Scottish Ministers (the Ministers) information relating to the future funding and financial efficiency of Scottish Water. The Ministers responded by providing one document to Mr Vass and stating that the remaining information was exempt from disclosure under section 29(1)(a) of FOISA. Following a review, Mr Vass remained dissatisfied and applied to the Commissioner for a decision.

Although the Ministers disclosed additional information during the course of the investigation, Mr Vass remained dissatisfied with the timing of the Ministers' release. The Commissioner therefore considered whether the Ministers were correct to withhold this information at the relevant time, that being at the time of their review of Mr Vass' information request.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr Vass' request in accordance with Part 1 of FOISA by correctly applying section 29(1)(a) to the withheld information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1) (Effect of exemptions); 29(1)(a), 29(2)(a) and 29(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

1. On 25 January 2010, Mr Vass wrote to the Ministers requesting the following information:
 - All communications between Ministers, civil servants and any other relevant third parties regarding the future funding of Scottish Water, including all communications before and after the foundation of the Scottish Futures Trust (SFT).
 - As a subset of this, all communications concerning Scottish Water in relation to SFT's role in evaluating its financial efficiency, both prior to and after the SFT was founded.



2. On 26 January 2010, the Ministers sought clarification of Mr Vass' request in respect of the term "future funding" and whether this meant funding other than through the current route involving Government loans and customer charges, or whether communications on the current funding mechanism should be included. The Ministers also sought clarification of which time periods Mr Vass was interested in.
3. Mr Vass provided clarification later the same day, indicating that he wished to access information from the last two years. He also indicated that he was particularly interested in possible funding alternatives but did not want to rule out all communications regarding the existing mechanism. Mr Vass also confirmed that he sought information relating to the strategy and means for funding Scottish Water as opposed to procedural issues relating to the existing funding mechanisms.
4. The Ministers responded to Mr Vass' request on 3 February 2010, disclosing one document to him and withholding the remaining relevant information on the grounds that it was exempt under section 29(1) of FOISA.
5. On 23 February 2010, Mr Vass wrote to the Ministers requesting a review of their decision. In particular, Mr Vass maintained that whether or not the exemption applied, it was hard to imagine a matter more strongly in the public interest than the future of the country's water provider.
6. The Ministers notified Mr Vass of the outcome of their review on 23 March 2010. They upheld the previous decision to withhold the information, indicating that the relevant exemption was that in section 29(1)(a) of FOISA. They explained why they considered that the public interest in maintaining this exemption outweighed that of disclosure of the information.
7. On 20 April 2010, Mr Vass 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.
8. The application was validated by establishing that Mr Vass 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

9. On 12 May 2010, the Ministers were notified in writing that an application had been received from Mr Vass and asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested (which was contained within 18 documents) and the case was then allocated to an investigating officer.



10. 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. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
11. The Ministers responded on 2 July 2010 providing submissions on their application of the exemption in section 29(1)(a) of FOISA. At this stage, the Ministers submitted that they also considered the withheld information to be exempt in terms of either section 30(b)(i) or 30(b)(ii) of FOISA. The Ministers also identified some personal information they considered exempt under section 38(1)(b) of FOISA.
12. The Ministers also stated that they now wished to release some of the information originally withheld from Mr Vass. This information was disclosed to Mr Vass on 13 September 2010.
13. Mr Vass was provided with an opportunity to comment on the additional exemptions applied by the Ministers and was asked to provide further comments as to why he considered the public interest to favour disclosure of the remaining information. Mr Vass was also provided with an opportunity to comment on the additional disclosures made by the Ministers.
14. Mr Vass responded with his comments on the public interest and the additional disclosures. He also confirmed that he was not concerned with the limited information which had been withheld under section 38(1)(b) of FOISA. Mr Vass' submissions, along with those of the Ministers are summarised and considered in the analysis and findings section below.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mr Vass and the Ministers and is satisfied that no matter of relevance has been overlooked.

The scope of the request

16. The Ministers identified 18 documents (which included some duplication) which held the information withheld from Mr Vass. On further consideration, the Ministers stated that they believed some of the information within these documents fell outwith the scope of Mr Vass' request. This was all information in document 2, elements of document 1 and the attachment contained in both of documents 3 and 4, and one of the sequence of emails contained in documents 6 and 12.
17. Having reviewed the information in question, the Commissioner is satisfied that the information detailed in the paragraph above, does fall outwith the scope of Mr Vass' request. The information in question either relates to general budget strategy across all government departments or the operation of Scottish Water rather than funding options, while one document relates to the administration of another FOISA request.



18. The Commissioner also considers that parts of document 18 falls outwith the scope of Mr Vass' request (where this it relates to the remuneration of an individual and the general operation of Scottish Water).
19. The information judged to fall outwith the scope of Mr Vass' request has not been considered any further within this decision.

Information disclosed during the course of the investigation

20. During the course of the investigation the Ministers disclosed the information in the following documents to Mr Vass (subject to removal of content judged to fall outside the scope of the request): documents 1 (subject to the redaction of one sentence withheld under section 29(1)(a)), 3, and 4 documents 10, 16 and the four covering emails that appeared (and in some cases were duplicated) within documents 6 and 12 (subject to the redaction of some content considered exempt), 14, 15 and 17. The Ministers also disclosed the covering letter and limited parts of the content of document 18. The Ministers continued to withhold the remaining information from Mr Vass.
21. Following receipt of the additional disclosures, Mr Vass expressed his dissatisfaction at the timing of the release and the innocuous nature of the information disclosed to him. In particular, he was concerned that the Ministers' decision to release additional information was on the basis that they knew their original position was untenable and had used it as a method of controlling the timing of the release.
22. Given the concerns raised by Mr Vass, the investigating officer queried the reasoning behind the disclosure of this additional material by the Ministers.
23. The Ministers responded by stating that on further scrutiny of the withheld information at appeal stage, and following discussion with the relevant policy officer, it was agreed that the sensitivity of the information had reduced with the passage of time and the exemptions no longer applied to some of the information. This information was therefore released. The Ministers stated that this decision was made entirely in accordance with FOISA and in no way was a tool for prevarication.
24. As Mr Vass expressed dissatisfaction regarding the timing of the release of these documents, albeit they were disclosed during the course of the investigation, the Commissioner has considered in what follows all of the information falling within the scope of Mr Vass' information request that was withheld by the Ministers following their review. This includes both the information that the Ministers still wish to withhold, and the information that was disclosed during the investigation.
25. The Commissioner has considered (as he is required to do in any case) the Ministers' handling of Mr Vass' information request (and in particular whether the Ministers were entitled to withhold the relevant information) in the circumstances that prevailed at that time of their review.



Section 29(1)(a)

26. Under section 29(1)(a) of FOISA, information held by the Scottish Administration (the Ministers) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
27. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation and when.
28. However, section 29(2)(a) indicates that once a policy decision has been taken, factual or statistical information used to provide an informed background to the taking of that decision can not be regarded as relating to the formulation or development of the policy in question.
29. The Ministers applied the exemption in section 29(1)(a) to all of the withheld information.
30. The Ministers explained that, on 21 February 2008, the Scottish Parliament agreed the following motion (S3M-1386)

"That the Parliament supports the retention of Scottish Water under public ownership and in that context calls on the Scottish Government to keep under review the structure and operations of Scottish Water, regulatory arrangements for the water industry to ensure that the interests of domestic and business customers are properly protected and alternative public sector models, including mutualisation, and report back to Parliament in due course."¹
31. In their submissions, the Ministers explained the Scottish Government had been in the process of developing policy on these matters, including the funding of Scottish Water, since the motion was passed. They noted that it had not yet formally reported back to the Parliament as outlined in the Motion and therefore considered the development of policy still to be in progress.
32. The Ministers explained that although, by that time, they had not opted to change the status of Scottish Water as a publicly funded body, this was very much a live and current issue.
33. The Commissioner is satisfied that the passing of the Motion initiated an active phase of policy development on the future status of Scottish Water. The Commissioner is also satisfied that process this was still active and had not reached completion at the time of Mr Vass' request and subsequent request for review.

¹ The debate is available at: www.scottish.parliament.uk/business/officialreports/meetingsparliament/or-08/sor0221-02.htm



34. The Commissioner is aware that the First Minister announced on 8 September 2010 (within his wider Statement on the Programme for Government) that the Government intends to bring forward a Water Bill, to develop the role of Scottish Water while retaining its publicly owned status. However, this announcement was made almost 6 months after the Ministers' review of their handling of Mr Vass' information request.
35. All of the documents under consideration reflect the early stages in the policy development process, in one case setting out the considerations in advance of the Scottish Parliamentary debate, and in subsequent communications containing consideration and discussion of the various options open to Ministers, setting out the risks and benefits of each option. The Commissioner is satisfied that the content of each item relates to the formulation and development of Scottish Administration policy.
36. Since the Commissioner is satisfied that the policy-formulation process remained ongoing at the time of the Ministers review of their handling of Mr Vass' request, there is no need for him to consider which parts of the information under consideration constitutes factual or statistical information used in the process of taking an informed decision, to which the terms of section 29(2)(a) could potentially apply.
37. Unlike other exemptions in FOISA, section 29 is not subject to a harm test (i.e. there is no requirement that substantial harm would be caused by the disclosure of the information for the exemption to apply). The Commissioner is therefore satisfied that section 29(1)(a) has been engaged in respect of all of the information under consideration in this decision.
38. This exemption is however, subject to the public interest test so information can only be withheld under this exemption if the public interest in maintaining the exemption outweighs the public interest in disclosure. While the authority is not required to show that release of the information would substantially prejudice the formulation of government policy, the Commissioner will consider whether harm would be caused by disclosure in his balancing of the public interest.

Public Interest Test

39. Mr Vass argued (in June 2010, and so some time before the First Minister announced the Programme for Government in September 2010) that the future ownership of Scotland's water provider is too important to be debated behind closed doors. He submitted that the public has the right to know about the extent to which privatisation was on the agenda. He argued further that the Scottish Government had not been entirely open on the possibility of a policy change in this area and that, consequently, the public interest was stronger than usual. He argued that the public interest in non-disclosure was outweighed by that in allowing full understanding of the policy debate.



40. The Ministers acknowledged that there is a public interest in understanding how policy on the future of Scottish Water is being developed, recognising that it is in the public interest that public authorities are accountable and transparent in developing policy on matter involving public funding. However, the Ministers argued that there is a greater public interest in ensuring that Ministers and officials have a private space within which to fully consider all advice and options, whether favourable or not, especially in regard to future plans for such an important and valuable company as Scottish Water.
41. The Ministers explained that the withheld information relates to ongoing policy issues which were (at that stage) incomplete, some of which would undergo a great many amendments. They argued that there is clearly a strong public interest in high quality policy-making and implementation and for this to be maintained, Ministers and officials need to be able to consider all available options when considering the potential use of public funds and to be able to assess options rigorously in order to understand the merits and demerits prior to the taking forward of proposals or the maintenance of the status quo.
42. The Ministers considered that the early, premature release of such policy discussions compromises the position of Ministers and officials and their ability to fully assess all relevant issues and to reach considered conclusions. For this reason the Ministers believed that the public interest in release of these documents was (at the point where they conducted their review) considerably outweighed by the public interest in maintaining the exemption.

Conclusions on the public interest test

43. Having considered the public interest both for and against disclosure identified by the Ministers and Mr Vass, the Commissioner concludes that there is no doubt that the future structure, ownership and funding of Scottish Water is a matter of significant public interest. The Scottish nation relies upon Scottish Water for the provision, treatment and disposal of water, and most households contribute to the cost of these services.
44. The argument that there should be an opportunity to see what options were or are being considered, put forward or discarded before decisions are taken, to allow public participation in decision making is readily acknowledged.
45. However, against disclosure, the information under consideration by the Ministers does not represent a decision on the future of Scottish Water or indeed what the Ministers considered to be the most favourable options. The Ministers' position and legislative proposal was announced some time after Mr Vass' review was concluded. A consultation has since commenced, allowing any interested parties to express their views on the Ministers' proposals.
46. The information presented in these documents clearly represents a considerably earlier stage in the policy making process, including discussion of a range of possible options and scenarios, largely proffered by and exchanged between officials. Even whilst putting them on the table as potential options some were deemed as being impracticable, and others were recognised as likely to be unpalatable or controversial whilst others were relatively embryonic in nature.



47. The Ministers have acknowledged that there would be a public interest in the release of this information, to ensure that public authorities are accountable in developing policies on matters which involve public funds. However, they argued that the public interest was outweighed by the public interest in ensuring that Ministers and officials are able to consider all available options without fear that release would compromise their ability to consider all the options equally.
48. The Commissioner recognises that it is in the public interest that all options are explored and considered by the Ministers and some space should be afforded for such a “brainstorming” period where ideas can be floated and an initial range of views gathered.
49. In all the circumstances, the Commissioner has found that there was, at the relevant time a significant public interest in Ministers being able to consider a range of options, some of which would discarded or developed further.
50. In reaching this conclusion, the Commissioner notes that Ministers cannot simply implement a policy decision without it being subject to Parliamentary scrutiny and public consultation. Withholding these particular documents at the time of Mr Vass’ request and subsequent review does not prevent future opportunities to engage with and influence the decision – making process.
51. Taking account of the timing of Mr Vass’ request, and recognising that the public interest in non-disclosure would be likely to diminish over time, the Commissioner has concluded that at the relevant time the public interest in disclosure was outweighed by the public interest in maintaining the exemption in section 29(1)(a).
52. As recognised by the Ministers, the public interest in non-disclosure of some of the information has diminished in the months since their review of Mr Vass’ information request and more information has been disclosed to him during the investigation. Since the Commissioner’s decision must be focussed on the point of the Ministers’ review, it would not be appropriate for him to consider the extent to which the public interest might have shifted since then with respect to the information disclosed during the investigation or the remaining withheld information.
53. Given the developments with respect to the Ministers’ policy towards Scottish Water in that period, however, the Commissioner considers it quite reasonable that the Ministers reconsidered the public interest in this case during his investigation.
54. Having concluded that all of the information falling within the scope of Mr Vass’ information request was exempt from disclosure at the relevant time under the terms of section 29(1)(a) of FOISA, the Commissioner is not required to consider any further exemptions in this case.



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 Vass by correctly applying section 29(1)(a) of FOISA to all of the information under consideration.

Appeal

Should either Mr Vass or the 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.

Margaret Keyse
Head of Enforcement
6 January 2011



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 –

- (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.

...

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

...

- (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;

...