

Decision Notice



Decision 011/2014 Mr Matthew Clark and the Scottish Ministers

Impact of reduction in corporation tax on Scottish economy: simulation data

Reference No: 201302133

Decision Date: 30 January 2014

www.itspublicknowledge.info

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Summary

On 10 July 2013, Mr Clark asked the Scottish Ministers (the Ministers) for data used to inform their paper *The Impact of a Reduction in Corporation Tax on the Scottish Economy*. The Ministers withheld the information under section 29(1)(a) of FOISA on the basis that it related to active policy development, and the public interest favoured the information being withheld.

Following an investigation, the Commissioner accepted that the Ministers had been correct to withhold the information under section 29(1)(a).

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), (2) and (3) (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 10 July 2013, Mr Clark wrote to the Ministers, requesting information which included the following:

... some information and data that the Scottish Government will have from its use of the simulation model to inform its paper "The Impact of a Reduction in Corporation Tax on the Scottish Economy" from November 2011¹.

I would like to request the data for the variable Government Consumption which was set out for "Period 20" and the "Long-run" in Table 1 on page 12 of the publication.

... I would like the year-by-year data for Government Consumption for each of the first twenty years. This request will include any variants of the simulation which may include different assumptions about when and how the policy is pre-announced.

¹ <http://www.scotland.gov.uk/Resource/0038/00388940.pdf>



2. The Ministers responded on 9 August 2013. They stated that the information he sought was exempt under section 29(1) of FOISA, explaining why the public interest test favoured this exemption being maintained.
3. On 15 August 2013, Mr Clark wrote to the Ministers requesting a review of their decision. He provided reasons why he did not agree with the Ministers' conclusions on the public interest.
4. The Ministers notified Mr Clark of the outcome of their review on 12 September 2013, upholding their original decision without modification.
5. On 12 September 2013, Mr Clark 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 Clark 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 19 September 2013, the Ministers were notified in writing that an application had been received from Mr Clark and were 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. They were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested, with particular reference to the application of section 29(1)(a) of FOISA.
9. The Ministers responded with submissions supporting their position to withhold the information in terms of section 29(1)(a). During the investigation, Mr Clark provided further submissions on the public interest.

Commissioner's analysis and findings

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



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

11. Under section 29(1)(a) of FOISA, information held by the Scottish Administration (defined in section 126 of the Scotland Act 1998 as members of the Scottish Executive, junior Scottish Ministers, non-ministerial office holders and their respective staff) is exempt information if it relates to the formulation or development of government policy.
12. The Commissioner's view, as expressed in the briefing on the application of section 29² 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.
13. For information to fall under this exemption, it need only relate to the formulation or development of government policy.
14. The Ministers explained that the withheld information provided advice to Ministers to assist them in the development of policy on corporation tax in Scotland, discussed in their report referred to in Mr Clark's request for information, "The Impact of a Reduction in Corporation Tax on the Scottish Economy".
15. The Ministers submitted that corporation tax policy fell within the wider discussion around the future fiscal framework in Scotland in the event of further devolution of fiscal powers or independence. They argued that corporation tax was one of the main levers controlled by a fiscally autonomous government and one of several key determinants of the wider economic policy pursued by such a government.
16. The Ministers stated that policy in this area remained under active development, and they had not reached a settled view on it. Therefore, they believed the withheld information was advice and evidence created in developing a policy that was still under development (the corporation tax policy within the context of wider fiscal policy that could be pursued by the Scottish Government under a different constitutional framework).
17. The Ministers submitted that the paper in question was not written specifically to demonstrate the impact of including corporation tax in the list of devolved powers in the Scotland Bill (now Scotland Act 2012). They explained that the published paper provided an illustrative case of what could happen to the Scottish economy should the corporation tax rate be reduced by a small amount. This analysis was intended to provide evidence for, and feed into, the wider debate on corporation tax and the devolution of fiscal powers to Scotland, without being confined to the propositions the Scottish Government made to HM Treasury with regard to the amendments to the Scotland Bill. In this context, they disagreed with Mr Clark's assertion that the information was no longer relevant to current policy work.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>



18. The Ministers went on to explain the information contained in the paper had been (and still was being) used extensively as part of the process of wider policy development regarding the economic levers that would be available to Scotland under either independence or greater fiscal devolution. In their view, the evidence developed as part of the earlier programme of work was still relevant and valid evidence for use in planning and developing future policies. The Ministers submitted that they needed to develop evidence and understanding with regard to the impact of change in subjects that remained reserved at present. Noting the ongoing preparations for a referendum on independence, they submitted that they had a duty to ensure that there was adequate planning and policy development to ensure they were ready for a smooth transition in the event of a vote in favour of independence.
19. The Ministers distinguished the withheld information from what was published in the report referred to above. The report discussed the potential long-term effect of the policy on government expenditure, not the likely short to medium terms effects on a year-by-year basis (as addressed in the withheld information).
20. The Commissioner has considered all of the submissions made by the Ministers on this point. While the setting of corporation tax rates is, and was at the time the Ministers dealt with Mr Clark's request and requirement for review, a reserved matter under the Scotland Act 1998, she acknowledges the relevance of this information to the Ministers' current policy planning. She also accepts that this information acquires particular relevance in a period of potential constitutional change, when such planning must address the possibility of greater degrees of fiscal autonomy than the Ministers possess at present.
21. In all the circumstances, therefore, the Commissioner accepts the Ministers' submissions that the withheld information relates to the continuing formulation and development of Scottish Government policy and therefore falls within the exemption in section 29(1)(a) of FOISA.
22. The Ministers also addressed the question of whether the information could be considered factual, which is relevant to the application of section 29(2) and (3). They submitted that it could not. The data in question could only be considered estimates, based on a number of assumptions which were subject to change (some of which would depend on future policy decisions while others were not within the control of government) and would therefore need to be checked at any given time. Having considered these submissions as they apply to the withheld information, the Commissioner accepts that the withheld information cannot be considered factual.
23. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out 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.



The public interest test

Ministers' submissions

24. The Ministers recognised a public interest in ensuring transparency and accountability in the decision making of government. They accepted that there was significant public, political and media interest in the development of corporation tax policy in Scotland in the event of a “yes” vote in the independence referendum or further devolution of fiscal powers. They accepted that releasing this information would provide further detail on the results of modelling a change in corporation tax policy and make the evidence underpinning the policy-making process on corporation tax more transparent and complete.
25. Balanced against this, the Ministers argued there was a need for Ministers and officials to fully review the evidence to develop policies, without the need for considering whether the subsequent publication of such information might lead to a misunderstanding of the Ministers’ position or policies. This would include evidence that was illustrative, provided by officials to highlight some of the possible policy options and outcomes.
26. The Ministers submitted that corporation tax policy continued to evolve as part of the wider policy on constitutional change. Therefore, the policy had not yet been fully discussed, considered or implemented. Given the nature of the information requested, disclosure while it still formed part of evidence for a policy in development might lead to the analysis being taken out of context, misunderstood, or used to create uncertainty about the Ministers’ intentions. In relation to a policy such as corporation tax, the Ministers did not believe this would be in the public interest.
27. The Ministers submitted that if analysis and evidence provided to inform policy in development was disclosed at an early stage of the debate, it might be misinterpreted by the public and have a disproportionate influence on the way policy was developed, compared to a more considered approach looking at a full range of options. In the Ministers’ view, disclosure in advance of the relevant policy being finalised could further complicate, and potentially jeopardise, policy formation and decisions. They believed this would lead to officials finding it necessary to exercise significantly more caution in preparing such analysis in future, which would in turn tend to constrain the substance of the evidence provided by officials and lead to less considered and thorough decision making. For example, the Ministers considered it far less likely that economists would be willing to develop indicative modelling (such as the withheld information in this case) if they felt it would be released into the public domain and potentially taken out of context. This was not in the public interest.

Mr Clark's submissions

28. Mr Clark argued that was in the public interest to see the data requested alongside all of the other data published by the Ministers (in the report referred to above). He believed the public should be fully informed about the implications of the Ministers’ policy on corporation tax. He did not understand why disclosure of this single indicator was not in the public interest when



publication of the charts for the other variables in the same document was. He emphasised that he was not seeking information “from all of the variations and experiments [the Ministers] may have conducted using the forecasting model they have chosen”, but rather “the 20-year annual projections for Government Consumption for the two scenarios already shown [in the published report]” (i.e. the withheld information).

The Commissioner’s view

29. The Commissioner has considered carefully the representations made by both Mr Clark and the Ministers when balancing the public interest both for and against disclosure of the withheld information. The Commissioner acknowledges the Ministers’ arguments that, to some degree, at least, the withheld information is different in character than any of the information presented in the published report. She accepts that the withheld information is relevant in informing the Ministers’ consideration of policy options which were current when they dealt with this request and requirement for review (and remain so).
30. The Commissioner acknowledges the general public interest for all options to be explored and considered by the Ministers while policy-making is ongoing, before a settled public view is reached.
31. She also acknowledges the public interest in the role that the withheld information may have to play in informing the public on the implications of the Ministers’ policy in this area, in the context of forthcoming referendum. However, she believes this role to be limited, bearing in mind the nature of the information and the fact that policy in this area continues to evolve. (i.e. the relevant policy continued to evolve at the time the Ministers dealt with Mr Clark’s request and requirement for review, a key consideration for the Commissioner in deciding where the public interest lies.)
32. In this case, in the absence of overriding public interest considerations favouring disclosure, the Commissioner considers it is in the public interest that the Ministers should be able to formulate policy fully, without being drawn into a public debate on matters which may never form part of their finalised policy position.
33. In all the circumstances of this case, the Commissioner has concluded that the public interest in disclosure of the withheld information was outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA. The Ministers were therefore entitled to withhold the information under that exemption.



DECISION

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

Appeal

Should either Mr Clark 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.

Rosemary Agnew
Scottish Information Commissioner
30 January 2014



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;

...

- (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

- (b) paragraph (b) of that subsection, as relating to Ministerial communications.

- (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.

...