

Decision Notice 011/2020

Internal communications about FOI Intervention

Applicant: The Applicant

Public authority: The Scottish Ministers

Case Ref: 201900846



Scottish Information
Commissioner

Summary

The Ministers were asked for internal communications relating to an intervention carried out by the Scottish Information Commissioner into their handling of information requests. The Ministers withheld information on the basis that disclosure would prejudice the effective conduct of public affairs.

The Commissioner investigated and found that the Ministers were correct to withhold the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b)(Effect of exemptions); 30(b)(ii) of FOISA (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. Both Appendices form part of this decision.

Background

1. On 3 August 2018, following dialogue with the Scottish Ministers (the Ministers) regarding the framing of these requests, the Applicant made a four-part request for information to the Ministers. The requests are set out in full in Appendix 2. This decision focusses on one of those requests, which was for all internal communications, from 1 June 2017 to 20 June 2018, between Ministers, Special Advisers and communication staff in relation to the Commissioner's intervention into the Scottish Government's handling of FOI requests from 01/06/2017 to 20/06/2018 (request 4).
2. The Ministers responded on 31 August 2018. They stated that they did not hold some of the information requested, but also advised that some information was available on their website, and that section 25(1) (Information otherwise accessible) of FOISA applied to that information.
3. On 6 September 2018, the Applicant wrote to the Ministers requesting a review of their decision. He did not accept that no information was held and suggested that the Ministers had misinterpreted his request.
4. On 2 October 2018, the Ministers notified the Applicant of the outcome of their review. They confirmed their initial decision. They explained that their searches had included search terms which would have found individual or collective references in relation to the three categories of individuals referenced in the request.
5. However, following an application to the Commissioner (which is considered in a separate decision), the Ministers acknowledged, on 17 April 2019, that they did hold information falling within the scope of the request. The Ministers provided another response to the Applicant. They disclosed some information, but withheld other information under section 30(b)(ii) of FOISA (Prejudice to effective conduct of public affairs) and section 38(1)(b) (Personal information).
6. On 20 May 2019, the Applicant made a further application to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the

Ministers' new review outcome, as he believed the Ministers had incorrectly applied section 30(b)(ii).

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information (in this case request 4) to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 25 July 2019, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
9. 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 to answer specific questions. These related to why they had withheld information from the Applicant.
10. The Applicant supplied arguments to support his position that the Ministers were not entitled to withhold the information.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Section 30(b)(ii) - Prejudice to effective conduct of public affairs

12. Section 30(b)(ii) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
13. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. The inhibition must be substantial and therefore of real and demonstrable significance.
14. Each request must be considered on a case-by- case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. 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 also whether the timing of disclosure would have any bearing.
15. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

16. The Ministers submitted that section 30(b)(ii) of FOISA applied to two principal types of information: information that related to the preparation of media lines and a handling plan; and information about potential questions that might be asked in a Parliamentary debate.

Preparation of media lines and handling plans

17. The information requested related to the Commissioner's intervention into Scottish Government FOI practice and performance and the period for the request included the publication of the Commissioner's intervention report. Accordingly, information within the scope of the request (with the exception of document 9) related to discussion of the media handling for the publication of that report.
18. The Ministers submitted that, in preparing media lines and handling plans, officials, special advisers and Ministers will test different approaches. Communications specialists will be involved in considering how those approaches might be received, and whether they will have a positive or negative outcome. Input from the policy leads ensures that the proposed lines and handling plans accurately reflect the Scottish Government's position and do not inadvertently mislead or misstate the position. Ministers and special advisers will also consider how lines and handling plans are likely to be received.
19. The Ministers said that production of lines and handling plans was "an iterative process": early ideas may be tested, refined, revised and reworked, and the final product may differ substantially from the starting point.
20. The section 30(b)(ii) exemption recognises the need for Ministers and officials to have a private space to develop, discuss, test and revise lines and handling plans before arriving at a final position, designed to be communicated publicly. However, the process to arrive at a final position is not a public process. The process involves the free and frank exchange of views. If the means by which such a position was arrived at were disclosed, the Ministers believed that all involved in the process would be substantially inhibited from giving their views freely. The Ministers' ability to test robustly proposed positions before using them publicly would be compromised substantially if every preliminary thought that had been recorded had to be disclosed.

Potential issues that might be raised in Parliamentary debate – document 9

21. This document relates to the Parliamentary statement given by the then Minister for Parliamentary Business on 13 June 2018 following the publication of the Commissioner's Intervention Report.
22. The Ministers explained that when a Minister is to make a Parliamentary statement or participate in a debate, the Minister receives extensive briefing from the policy officials who lead on the subject-matter of the statement or debate. Typically, the officials will seek to anticipate questions or issues that might be raised, and ensure that the Minister is appropriately briefed to respond. This process too is iterative, with potential questions and related responses being tested and refined. The Ministers believed that section 30(b)(ii) exemption applied for similar reasons to those given for the preparation of media lines and handling plans.
23. Much of the briefing is intended to rebut arguments made by other MSPs. However, as the arguments are not known in advance, much of the information is speculative. If deployed, it will enter the public domain – but until deployed, it remains the advice of officials to their Ministers, given freely and frankly. If such preparatory material, is routinely disclosed, the

Ministers believed this would substantially inhibit the production of briefing in that way, with the result that Ministers would be less able to participate fully in Parliamentary proceedings.

The Commissioner's conclusions

24. The Commissioner has considered all the submissions made by the Ministers and the Applicant, along with the withheld information under consideration. 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. The Commissioner accepts that there is a need for Ministers and officials to have a private space to develop, discuss, test and revise lines and handling plans before arriving at a final position, designed to be communicated publicly. Such a process will involve the free and frank exchange of views. Disclosure of these views (at the time of the request or review) would substantially inhibit those involved from giving their views freely.
25. Similarly, the Commissioner accepts that officials will seek to anticipate questions or issues that might be raised to ensure that a Minister is appropriately briefed to respond to questions. Disclosure of such information would substantially inhibit the production of briefing in that way, with the result that Ministers would be less able to participate fully in Parliamentary proceedings.
26. Although the request was made after the publication of the report, the Commissioner's intervention was ongoing at the time of the request and review and, indeed, it still is. In all the circumstances of the case, the Commissioner accepts that disclosure of the withheld information would be likely to result in substantial inhibition to the free and frank exchange of views for the purposes of deliberation, as argued by the Ministers. As such, he is satisfied that the information under consideration here is exempt from disclosure in terms of section 30(b)(ii) of FOISA.

Public interest test - section 30(b)(ii)

27. 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.
28. For preparation of media lines and handling plans, the Ministers acknowledged the public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate, particularly in relation to a high profile matter like the Commissioner's intervention. However, they believed it is also in the public interest that they were properly prepared to respond to the intervention report when it was published, including preparing media lines and a handling plan to respond. Were information of this sort to be disclosed, the Ministers submitted it would substantially affect the willingness of all concerned to take part in such discussions, with the result that the Ministers' response would have been less fully tested and less robust. The Ministers submitted that this would not be in the public interest and, taking all of this together, the public interest in withholding the information outweighs that in favour of disclosing it.
29. For the potential issues that might be raised in Parliamentary debate, the Ministers' position again was the same as at review, and for the same reasons then given. Whilst a public interest in open, transparent and accountable government was acknowledged in this context, the Ministers submitted that the public interest favoured the position that the Ministers were properly prepared to respond to matters that might arise in the course of a Parliamentary statement on the report. In order for them to be properly prepared, it was necessary that free

and frank discussions could take place among officials, Ministers and special advisers about the content of the briefing.

30. Again, the Commissioner has considered the submissions from both parties, together with the withheld information.
31. The Commissioner recognises that there is always a public interest in transparency and accountability and scrutiny of decisions and decision-making processes of public authorities. Information related to the Commissioner's intervention into the Scottish Government FOI practice and performance is of public importance, given its potential impact.
32. The information withheld here is, as the Ministers have categorised, information on preparation of media lines and handling plans, and issues to be responded to by a Minister. Whilst there is a public interest in transparency of how the Ministers create such handling plans or brief a Minister, this must be balanced against the public interest in Ministers being able to hold internal discussions and debate in a private space, in this case while considering how to respond to questions about the Commissioner's intervention report. He acknowledges that the ability to do so, safe in the knowledge that information will not routinely be publicly disclosed, will be required on occasion to allow open and frank exchanges to support informed decision-making. The Commissioner accepts that the public interest does not lie in disclosing information that would limit such future discussion or debate, where to do so would substantially inhibit the quality of the Ministers' decision-making.
33. On balance, therefore, the Commissioner finds that the public interest in disclosure of this information is outweighed by that in favour of maintaining the exemption in section 30(b)(ii) of FOISA.
34. In reaching this conclusion, the Commissioner has taken into account that the content of his report has been published in full and this has, to some extent, satisfied the public interest.
35. Accordingly, the Commissioner has concluded that the Ministers were entitled to withhold the information in terms of section 30(b)(ii) of FOISA.

Decision

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

Appeal

Should either the Applicant or the 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.

Margaret Keyse
Head of Enforcement

23 January 2020

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-

...

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

...

Appendix 2

1. All internal communications held by the FOI unit involving Scottish Ministers, Special Advisers and communication staff in relation to the letter, published 1/6/17 by CommonSpace and The Ferret and widely covered both in the media and parliament, raising concerns of journalists regarding the Scottish Government's FOI policies. The time frame for this request is 01/06/2017 to 20/06/2018.
2. All internal communications held by the FOI unit involving Scottish Ministers, Special Advisers and communication staff in relation to the [the Commissioner's] intervention into the Scottish Government's handling of FOI requests, announced in November 2017 and for which the final report was published on 13/6/18. The time frame for this request is 01/06/2017 to 20/06/2018.
3. All internal communications between Special Advisers, Communications staff and Ministers in relation to the letter, published 1/6/17 by CommonSpace and The Ferret and widely covered both in the media and parliament, raising concerns of journalists regarding the Scottish Government's FOI policies. The time frame for this request is 01/06/2017 to 20/06/2018.
4. All internal communications between Special Advisers, Communications staff and Ministers in relation to the [Commissioner's] intervention into the Scottish Government's handling of FOI requests, announced in November 2017 and for which the final report was published on 13/6/18. The time frame for this request is 01/06/2017 to 20/06/2018.

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