

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 4th February 2008

Public Authority: The Scotland Office
Address: 1 Melville Crescent
Edinburgh
EH3 7HW

Summary

The Complainant requested access to a file held by the Scotland Office. The Scotland Office refused this request under sections 28 and 35 of the Act. The Commissioner has investigated and found that section 28 is not engaged as the Scotland Office failed to demonstrate that disclosure of the information would, or would be likely to prejudice relations between the devolved administrations. The Commissioner found that section 35 was engaged, as the information does relate to the formulation and development of government policy, but concluded that the public interest favoured disclosure of the information. The Commissioner requires the public authority to disclose the requested information within 35 calendar days of this notice.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant has advised that on the 6 December 2006 he made the following request for information to the National Archives of Scotland:

"I wish to gain access to certain documents contained in the Secretary of State for Scotland Office Files, Dover House series held by the National Archives of Scotland. The documents are listed in the NAS catalogue as follows:

Country Code: GB

Rep Code: 234
Repository: National Archives of Scotland
RefNo: SOE 14/297/2
Title: Devolution
Date: 1998-1992
Description: Possible establishment of Select Committee on Scottish affairs to study possibility of devolution, speaking notes for debate in Scottish Grand Committee on implications of a devolved parliament, Euram study of Scottish business leaders and threat to union from Scottish National Party support.
Access Status: Exempt
Access Conditions: The information in this item is exempt under section 28 (relations within the United Kingdom) of the Freedom of Information Act 2000, and as such will not be available for public consultation until 01/01/2023. To request access to it whilst the exemption is current, please contact the NAS Freedom of Information Officer. For further details please look in the Freedom of Information (FOI) section of our website or ask a member of staff.
Open from: 01/01/2023
Dept Cipher: Unregistered.

3. On 7 December 2005 the National Archives of Scotland (NAS) replied informing the complainant that the information requested is contained in papers of the Secretary of State for Scotland and as such the information is covered by the Freedom of Information Act and not the Freedom of Information (Scotland) Act. NAS told the complainant that he therefore needed to redirect his inquiry to the Scotland Office.
4. The complainant redirected his request to the Scotland Office on 7 December 2005.
5. On 23 January 2006, having received no response, the complainant wrote to the Scotland Office to ascertain the progress of this request.
6. The Scotland Office responded on 23 January 2006 confirming receipt of the request and updating the complainant on its progress.
7. The Scotland Office issued a refusal notice on 15 February 2006 confirming that it held the information but refusing to disclose under section 28 and 35 of the Act. In applying the public interest test the Scotland Office found that in both cases the public interest lay in maintaining the exemption.
8. The complainant requested an internal review on 15 March 2006. In his request he put forward a number of arguments to challenge the Scotland Offices use of the exemptions at sections 28 and 35 of the Act.

9. The Scotland Office completed its internal review and communicated the outcome to the complainant on 17 May 2006. The Scotland Office upheld the decision to withhold the information under sections 28 and 35 of the Act.

The Investigation

Scope of the case

10. On 2 June 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the Scotland Office's application of the two exemptions in relation to the information held.

Chronology

11. The Commissioner was not able to begin his investigation until 27 July 2007 when he wrote to the Scotland Office. In his letter the Commissioner requested a copy of the withheld information and further explanation regarding the application of the exemptions.
12. The Scotland Office responded on 11 September 2007 supplying the Commissioner with background information to the existence of the file, further arguments regarding the application of the exemption and a copy of the withheld information. The Scotland Office explained that the file number requested was listed in the National Archives of Scotland with an inaccurate description. The file requested was originally part of a larger file which is open, and the description of the larger file was copied onto the smaller file when it was created. It is the file number requested that the Scotland Office had found to be exempt under section 28 and 35. The Scotland Office offered to explain this to the complainant and to direct him as to where the file containing the information described could be found.
13. The Commissioner wrote on 17 September 2007 asking the Scotland Office to explain to the complainant the contents of the file requested in light of the above and for more information regarding the application of section 28.
14. Whilst awaiting this response, the Commissioner wrote again on 8 November 2007 requesting the Scotland Office also provide more detail on the public interest arguments considered for both exemptions.
15. The Scotland Office responded on 3 December 2007, it provided the Commissioner with further arguments regarding the application of both exemptions and an expansion on the public interest test considered. The Scotland Office also provided the Commissioner with a copy of the letter sent to the complainant explaining the status of the file.

Findings of fact

16. File SOE 14/297/2 (file 2) contains three papers which were originally held within a file titled SOE 14/297/1 (file 1). File 1 is classed as 'open' and is now available to all on request at the National Archives of Scotland. An early assessment of File 1 deemed three papers to be exempt from under the Act and as a result they were removed from the file and File 2 was created, this is the file requested by the complainant.
17. The National Archives of Scotland provides a description of the contents of each file held in its Archive; in this case File 2 was catalogued with an exact copy of the description as File 1 originally and continues to have.
18. The information held in file 2 consists of three papers being withheld under section 35 and 28: Assembly Costs dated 21 June 1990; Northern Ireland Office – Briefing on Devolution for No 10; and Northern Ireland Office – Draft Letter for Signature by PM.

Analysis

Procedural matters

19. Section 17(1) states that a public authority which, in relation to any request for information, is to any extent relying on a claim that information is exempt information, must within the time for complying with section 1(1) given the applicant a notice which:
 - (a) states the fact that information is exempt,
 - (b) specifies the exemption in question, and
 - (c) states why the exemption applies.
20. Section 17(3) states that if a public authority is relying on a qualified exemption it must state the reasons for claiming that, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information
21. Section 10 of the Act provides that a public authority must comply with section 1 of the Act no later than the twentieth working day following receipt of the request. Section 1 states that a person making a request for information is entitled to be informed in writing if the information is held and if so to have the information communicated to him.
22. The complainant made his original request on 6 December 2005 to the National Archives of Scotland; following advice from the National Archive of Scotland he made the request again to the Scotland Office on 7 December 2005. The Scotland Office issued a refusal notice on 15 February 2006 outside of the 20 working days as required by section 10 of the Act; this is in breach of section

17(1). The refusal notice explained why the exemptions applied but made no mention of the public interest test as required under section 17(3).

Exemption: Section 28 'Relations within the United Kingdom'

23. Section 28 (1) provides that information is exempt information if its disclosure under the Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.
24. Section 28(2) defines administration in the United Kingdom as (a) the government of the United Kingdom; (b) the Scottish Administration; (c) the Executive Committee of the Northern Ireland Assembly; or (d) the National Assembly for Wales.
25. The Scotland Office argue that the information falls within the definition of 'sensitive information held by UK Government departments on devolved matters which pre-date devolution but which concern the devolved administrations'. The information was created between 1988 and 1992 prior to the creation of the Scottish Parliament and devolved administration but the issues under discussion are now resurfacing as current policy consideration. The Scotland Office assert that to disclose this information would, or would be likely to, prejudice relations within the UK as the arguments put forward in these papers could be viewed as relevant to policy considerations that officials are currently working on.
26. Paper 1 'Assembly Costs' is a chain of correspondence between officials and Ministers in which advice and response to that advice is provided on the question of financing a Scottish Assembly. Much of the information contained within the papers is statistical, showing the calculations of the options before providing comment. The Scotland Office found that the discussion surrounding this debate had currency at the time the request was made and remains current now.
27. The Scotland Office explained that the paper refers what is now known as the Barnett Formula. The Barnett Formula has been used for over twenty years and is the means of determining the budgets of the three territorial departments and now the devolved administrations. The Barnett formula does not determine the overall size of the budgets but provides that, where comparable, changes to programmes in England result in equivalent changes in the budgets of the devolved administrations calculated on the basis of population shares. The formula is still in use and a major enquiry into it was conducted by the Treasury Committee in 1997 and 1998. The Scotland Office believe that disclosing the discussions on the Barnett Formula contained in the paper would prejudice the Government's ability to continue to assess its operation to ensure it remains fit for purpose.
28. The Scotland Office believe that it would be prejudicial to put the 'thinking space' information contained within these documents into the public domain and risk undermining the relations between the Devolved Administrations and Government.

29. Papers two and three demonstrate the sharing of information between the Northern Ireland Office and the Scottish Office (as the Scotland Office was then known) to ensure that a consistent and collegiate approach was taken in lines to take during the development of policy on devolution in both Northern Ireland and Scotland.
30. The Scotland Office explained that at the time of the request a sensitive point had been reached in the devolution and peace process of Northern Ireland. The request was received in December 2005 and in the September of 2005 the independent decommissioning monitor declared that the IRA had decommissioned all its weapons. This was a clear requirement of the Government's policy towards the re-establishment of the peace process. To release any information at the time would undermine and potentially irrevocably damage the Government's policy of establishing a stable form of governance in Northern Ireland.
31. The Commissioner has applied the test for 'would or would be likely to prejudice' as set out in the Tribunal decision EA/2005/005 *John Connor Press Associates vs. the Information Commissioner*. The Tribunal confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk." (Para 15). This was further expanded in the Tribunal decision *Hogan vs. the Information Commissioner EA/2005/0026* and *Bexley vs. the Information Commissioner EA/2006/0060*.
32. In these cases the Tribunal considered what was meant by "would be likely to prejudice" and when a prejudice based exemption might apply. The Tribunal found that 'prejudice must be real, actual and of substance', it went on to explain that there are two alternative ways in which disclosure can be said to prejudice and that one of these must be shown. Where prejudice 'would be likely to occur' the likelihood need not be more probable than not, though it should be real and significant; where prejudice 'would' occur, the change should be greater – more probable than not.
33. The Commissioner has had sight of the disputed information and is not persuaded by the Scotland Office's arguments that disclosure would or would be likely to prejudice the government's relationship with the devolved administrations. In reaching this decision the Commissioner has taken into account the largely historical nature of the information, the change in all parties stance towards devolution and the content of the papers themselves.
34. As highlighted by the Scotland Office, paper 1 discusses different options for the financing of a proposed Scottish Assembly. The paper outlines expenditure assumptions, assumed population figures and factual information from the Inland Revenue, before continuing to hypothesise on how the assumed expenditure could be met. The paper then assesses, briefly, each option pointing out concerns with the two methods. The Commissioner does not consider that disclosure of this information at the time the request was made would, or would be likely, to have had the prejudicial impact asserted by the Scotland Office. At the time of the request the Labour Government was in place, and as a result of the Scotland Act 1998 the Scottish Assembly was in place. Additionally the

Conservative Party, the authors of the original document, had changed their position regarding devolution and to support the existence of a Scottish Assembly.

35. The Commissioner recognises the concerns that the Scotland Office has regarding the need to continually reassess the validity of the formula discussed in the paper and the need for the government to keep alternative methods of funding arrangements up to date in terms of their monetary impact. However, he does not find that this concern relates to any prejudicial impact on relations between the devolved administrations.
36. Paper two is a briefing note written by the Northern Ireland Office and copied to the Scottish Office for their information. The note is brief and highlights the different positions, with reference to the question of devolution, of Northern Ireland and Scotland. The note also states the government's position at that time to devolution in Northern Ireland. Paper 3 contains a draft letter which also highlights and discusses, briefly, the different political situations of Northern Ireland and Scotland and the perceived feelings of both communities on devolution.
37. As discussed above in relation to paper 1 the Commissioner does not consider that disclosure of this information would, or would be likely, to prejudice relations between the devolved administrations. The Commissioner notes that since the information was created, over 15 years ago, the political climate has changed considerably and the relative situations of Northern Ireland and Scotland are no longer as described within the documents. The Commissioner does not consider that any previous understanding of situations which have significantly changed would have a prejudicial impact today. The Commissioner recognises the concerns of the Scotland Office (para 30) but having viewed the content of the papers does not find that the discussion contained within would have the impact asserted, much of the content is factual, outlining the history and situation at the time in Northern Ireland.
38. The Commissioner finds that section 28 is not engaged as the Scotland Office have failed to demonstrate that disclosure would, or would be likely to prejudice relations between any administration within the United Kingdom and any other such administration.

Section 35(1) (a) 'Formulation of government policy'

39. Section 35(1) of the Act provides that Information held by a government department or by the National Assembly for Wales is exempt information if it relates (a) the formulation or development of government policy.
40. The Commissioner takes the view that the 'formulation' of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing

policy. As a general principle, however, he considers that government policy is about the development of options and priorities for Ministers, who determine which options, should be translated into political action.

41. The Commissioner has obtained a copy of the three papers and considers that the information contained within falls within the definition of 'formulation and development' of policy. Paper 1 discusses possible funding options for a Scottish Assembly in which a number of options are considered and evaluated. The Scotland Office explained at the time papers two and three were created Sinn Fein had recently set out its first public document detailing its political peace strategy. This was seen as the first major step towards restoring the peace process in Northern Ireland and the handling of all public lines and argumentation at this time was part of the Government's policy formulation and development process leading up to the Downing Street Declaration in 1993.
42. Having considered the information withheld by the Scotland Office, the Commissioner takes the view that all of it engages section 35(1) (a).

Public Interest Test.

43. Section 35 is a qualified exemption and the Commissioner must therefore decide if the public interest in favour of maintaining the exemption is outweighed by the public interest in disclosure of the requested information.
44. The Scotland Office found that the public interest favoured maintaining the exemption. It explained that at the time of the request there were current policy assessments on related matters underway within the UK Government. The Barnett Formula has been much criticised and to have released this information would have impaired the Government's ability to develop and revise its policy around the formula which would not be in the public interest. The Scotland Office also pointed out the currency of this information given that the new CSR (Comprehensive Spending Review) had set a challenging budget within which to deliver its programme of administration, and the recently elected Scottish Executive is committed to a new form of local taxation in Scotland to fund some major policy areas. The Comprehensive spending review was first undertaken by the Government in 1997 prior to the introduction of the Scotland Act 1998; the aim was that this would then be carried out every three years, 2000, 2003, and 2006. The 2006 CSR was delayed until 2007. The CSR looks at all aspects of public spending and can increase the allocation of funds to Scotland, allocated under the Barnett formula. It is the Scotland Office's assessment that releasing policy ideas and discussions contained within paper 1 would have a prejudicial impact on the Government's ability to develop current policy for national funding arrangements and to respond to the Scottish Executive.
45. The Commissioner notes that the use of the Barnett formula to determine funding for the devolved administration is public knowledge as is the outcome of the CSR's undertaken to date. The options discussed in paper one on the possible funding options for a Scottish Assembly were to have been expected by any government considering the introduction of a Scottish Assembly. Whilst the Commissioner accepts that criticism and debate of the Barnett formula is and was

ongoing at the time of the request he does not believe that disclosure of the requested information would inhibit the government's ability to reassess its policy on funding.

46. The Scotland Office concluded that it is not in the public interest to undermine the position of the UK government in negotiations with the Devolved administrations nor is it in the public interest to reveal policy ideas which have not been publicly discussed by the Government. The Scotland Office also asserted that if the officials who wrote the briefing were aware that it would be made public the candid assessment they provided on a number of different options might not have been provided to Ministers and as a result decision making could be inhibited.
47. In relation to Papers two and three the Scotland Office also found that it would not be in the public interest to release information produced during the difficult time of policy formulation of the Northern Ireland peace process as to do so would have had the potential to undermine the progress being made at the time the request was received.
48. In reaching a decision as to where the balance of the public interest lies the Commissioner has had regard to the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006). The Tribunal stated that '*The timing of a request is of paramount importance*'. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the '*threat of lurid headlines depicting that which has been merely broached as agreed policy*'. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a '*parliamentary statement announcing the policy... will normally mark the end of the process of formulation*'. In this case the discussion in paper one on the possible funding of a Scottish Assembly took place prior to the election of the Labour Government and the introduction of a devolved Scottish Parliament. Whilst the Commissioner recognises that the question of funding is likely to be continually reassessed over time he does not accept that the options discussed in this paper have a direct, negative impact on this process. Much of the information in this paper is based on expenditure assumptions which have now been superseded and whilst debate has been reignited in relation to a new form of local taxation, the information contained within the paper does not have a direct impact on this.
49. The Commissioner notes that the information in this case is between 15 and 17 years old and was created in a different political climate, one in which a different party was in government and devolution was not a favoured option.
50. The Tribunal also place a significant weight on considering the information itself. As discussed in relation to the analysis on section 28, paper one is largely statistical and factual and whilst there is reference to opinion of preferred options and relative merits of both, this is largely historical and has been superseded by the introduction of the Scotland Act 1998. Similarly, papers two and three outline the Government's thoughts on devolution and the relative position of Northern

Ireland and Scotland. Clearly this position has changed due to the Scotland Act 1998 and the current situation in Northern Ireland.

51. The Scotland Office have also asserted that revealing the candid assessments provided by officials might result in officials in the future being less willing to participate and being inhibited in expressing their views openly. In the Commissioner's opinion the papers do not contain any information which would cause officials to be less willing to contribute openly and fully in the future. The Commissioner is not convinced that disclosure of the requested information would, or would be likely to, lead to contributors being less candid in future reports, letters or papers. Such senior civil servants would be in breach of their professional duty should they fail to deliver the quality of advice and assessment they are expected to do. In the DFES case the Commissioner accepted that there is a public interest in accurate record keeping. Although openness may have some effect on the way meetings are minuted, ensuring accurate enough records are kept to meet the public authority's business needs is primarily a management issue. Again it does not follow that disclosure of these minutes would lead to less full or accurate record keeping.
52. The Commissioner considers that disclosure of the information would promote and further understanding of the issues under consideration from a period of relative recent history and provide an insight into how the political landscape has changed.
53. The Commissioner's assessment is that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information

The Decision

53. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

The Commissioner finds that in responding outside of the twenty working days as required under section 10 of the Act, the Scotland Office breached section 17(1); and by failing to state the reasons for claiming that the public interest in maintaining the exemption outweighed the public interest in disclosure it was in breach of section 17(3) of the Act.

The Commissioner finds that the Scotland Office incorrectly relied on sections 28 and 35 to withhold the requested information.

Steps Required

54. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose all the information withheld under sections 28 and 35

55. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

56. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

57. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 4th day of February 2008

Signed

**Richard Thomas
Information Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**