

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 February 2014

**Public Authority:** Attorney General's Office

**Address:** 20 Victoria Street  
London  
SW1H 0NF

#### **Decision (including any steps ordered)**

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1. The complainant asked the public authority to provide him with advice from the Law Officers to the United Kingdom's Government on Scotland's future membership of the European Union if it votes for independence.
2. The Commissioner's decision is that the public authority was entitled to neither confirm nor deny whether it held any information within the scope of the request on the basis of sections 35(1)(c) and 35(3) FOIA.
3. The Commissioner does not require the public authority to take any steps.

#### **Request and response**

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4. On 8 July 2013 the complainant wrote to the public authority and requested information in the following terms:  
*'Under the terms of the Freedom of Information Act, please send me advice from Law Officers to the UK Government on Scotland's future membership of the European Union if it votes for independence.'*
5. The public authority responded on 1 August 2013. It neither confirmed nor denied whether it held any information within the scope of the request on the basis of the provisions in sections 35(1)(c) and 35(3) FOIA.
6. Following an internal review the public authority wrote to the complainant on 19 August 2013. It upheld its original position.

## Scope of the case

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7. The complainant contacted the Commissioner on 19 August 2013 to complain about the way his request for information had been handled. He challenged the application of sections 35(1)(c) and 35(3) on a number of grounds which are addressed further below.
8. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to neither confirm nor deny whether it held any information within the scope of the request above (of 8 July 2013)<sup>1</sup> on the basis of sections 35(1)(c) and 35(3) FOIA.
9. The Commissioner would at this point like to stress that he is not personally aware whether or not the public authority holds any information within the scope of the request as he does not consider this necessary in order for him to make a determination in respect of the application of exemptions in this case.

## Reasons for decision

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10. Section 35(1) provides:

*'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—*

*(a) the formulation or development of government policy,*

*(b) Ministerial communications,*

*(c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or*

*(d) the operation of any Ministerial private office.'*

11. Section 35(3) provides:

*'The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).'*

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<sup>1</sup> Referred to interchangeably as 'the requested information'

12. A public authority's *duty to confirm or deny* whether it holds information requested by an applicant is imposed by section 1(1)(a) FOIA. A public authority may however exclude itself from complying with section 1(1)(a) on the basis of section 35(3).
13. The *Law Officers* are described in section 35(5) FOIA as: the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland and the Attorney General for Northern Ireland. The Law Officers are therefore the United Kingdom's (UK) most senior legal advisers.
14. The public authority neither confirmed nor denied whether it held information relating to the provision of advice by any of the Law Officers or any request for the provision of such advice regarding Scotland's future membership of the European Union (EU) if it votes for independence in the forthcoming referendum on whether Scotland should be an independent country from the UK.
15. The Commissioner is satisfied that the requested information, if held, would relate to advice requested from or provided by, the Law Officers. The request effectively sought confirmation of the existence of, and if so disclosure of, advice from Law Officers to the government. The request therefore falls within the scope of the exemptions at sections and 35(1)(c) and 35(3). The Commissioner therefore finds that the exemptions were correctly engaged.

### **Public interest test**

16. The exemptions at section 35 are qualified exemptions. Therefore, the Commissioner next has to consider whether in all the circumstances of the case, the public interest in maintaining the exemption at sections 35(1)(c) and 35(3) outweighs the public interest in the public authority confirming or denying whether it held any information within the scope of the request.

### *Complainant's arguments*

17. The arguments submitted by the complainant in support of his position are reproduced in paragraphs 18 to 24 below.
18. The public authority is of the view that disclosure would clearly harm the public interest as it would impinge on the government's confidential space to evaluate matters internally with candour and free from the pressures of public political debate. However, the extent of this confidential space should be extremely limited during a referendum when it is up to the public rather than Ministers to evaluate matters. In a referendum the public political debate should take precedence over the confidential space of Ministers. As such the public should have

access to the best available impartial advice to make an informed decision.

19. The public authority is of the view that the volume of information the government has already put into the public domain satisfies the public interest in the public having access to impartial information. In support, the public authority refers to the '*independent expert opinion*' of Professors James Crawford and Alan Boyle. However, the title page of the relevant report states that it was '*Presented to Parliament by the Secretary of State for Scotland.*' This immediately calls into question the impartiality of the report as the Scottish Secretary has a stated aim of keeping the UK together. It is questionable whether the Scottish Secretary would present a document which contradicts his stated policy. Only by opening Law Officers' advice to the public will the public be able to make a fully informed decision, free from the partisan influence of those who have a stake in one particular outcome.
20. An example of the influence such information could have is the McCrone Report which advised that the scale of oil tax revenues made it no longer tenable to say that an independent Scotland could not manage financially. The report was kept confidential by the government of the day but in the opinion of the author Gavin McCrone, it could have had a material impact on the devolution referendum in the 1970s. Both sides of the debate on Scottish independence have been able to cherry-pick expert advice to support their objectives. The Scottish Government's own consultation received opinions which conflicted with the advice of James Crawford and Alan Boyle from equally eminent experts. The public authority has stressed the *volume* of information made available to the public is key rather than the *quality*.
21. The public authority wrongly states that the Scottish Information Commissioner's (SIC) decision to order the disclosure of legal advice does not mention section 29(1)(c) of the Freedom of Information Scotland Act 2002 (FOISA), the Scottish equivalent of section 35(1)(c) FOIA. The SIC's Decision 111/2012 (Catherine Stihler and the Scottish Ministers) states: '*The Commissioner has found that the Ministers were not entitled to refuse to reveal, in terms of section 18(1) of FOISA, whether the legal advice in question exists or is held by them.*'
22. Section 18(1) FOISA states: '*Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.*' While the decision does not mention

section 29(1)(c) specifically, section 18(1)(c) mentions the authority's right to refuse under any of sections 28 to 35. The SIC ruled that the Scottish Government was not entitled to refuse under the terms of section 18(1) which by extension means it was not entitled to refuse under section 29 which is encapsulated within sections 28 to 35.

23. Moreover, the Scottish Government has specifically linked its grounds for initially challenging the SIC's Decision 111/2012 to specific Law Officer advice. On October 23 2012, Nicola Sturgeon (Deputy First Minister of Scotland) said: *'The Scottish Government has previously cited opinions from a number of eminent legal authorities, past and present, in support of its view that an independent Scotland will continue in membership of the European Union but has not sought specific legal advice.....In confirming that the Government has now asked for law officers' advice, I have sought and received the prior agreement of the Lord Advocate.'* In other words, in complying with the SIC's Decision 111/2012, the Scottish Government revealed that it had consulted Law Officers.
24. The public authority is of the view that the Scottish Government's decision to disclose that it has taken its own Law Officer advice does not bind the government to do likewise. This may arguably be the case in a legal sense but not from a democratic point of view. When one side of the debate is compelled to be more open and transparent than the other, it creates a clear democratic disparity.

#### *The public authority's arguments*

25. The arguments submitted by the public authority in support of its position that the public interest is in favour of neither confirming nor denying whether it held any information within the scope of the request (by virtue of sections 35(1)(c) and 35(3) ) are reproduced in paragraphs 26 to 37 below.
26. There is a clear public interest in securing for the government, confidential space within which it can evaluate matters internally with candour and free from the pressures of public political debate.
27. The government is entitled to seek and receive frank and confidential advice from its legal advisers, and there is a strong public interest in ensuring that the government is able to act free from external pressure in deciding what sort of legal advice it obtains, at what stage, from whom, and in particular whether it should seek advice from the Law Officers. This strong public interest is reflected in the long-standing convention, observed by successive governments, that neither the advice of Law Officers, nor the fact that their advice has been sought, is disclosed outside government. This is recognised in paragraph 2.13 of

the Ministerial Code. It is also an interest which is recognised by the particular form of words used in section 35(1)(c) in contrast to the general provision in relation to legal professional privilege in section 42(1) FOIA.

28. Since the Law Officers are the government's most senior legal advisers, their advice has a particularly authoritative status. However, the need for the government to obtain legal advice on a very wide range of matters is such that it would be impossible for such advice to be provided by the Law Officers in every case. Disclosure of the occasions when legal advice has been sought from the Law Officers would therefore have the effect of disclosing those matters which, in the judgement of the government, have a particularly high political priority or are assessed to be of particular legal difficulty. This would be directly counter to the strong public interest which underlies the whole of section 35. To disclose routinely whether the Law Officers have advised on particular issues would potentially create a two-fold detriment. On the one hand, to disclose that they have advised on an issue would be taken to indicate that particular importance was attached to it or even that the government was in particular doubt about the strength of its legal position. Even if the impression were unfounded, the risk of creating it might deter the government from consulting the Law Officers in appropriate cases. On the other hand, to disclose that the Law Officers have not advised on an issue might expose the government to criticism for not having consulted them, and hence having failed to give sufficient weight to an issue or obtain the best advice. Again, even if unfounded this could lead to pressure to consult the Law Officers in inappropriate cases or in an unmanageably large number of cases.
29. There is a public interest in knowing whether the Law Officers have advised on the implications of Scottish independence and, if so, the nature of that advice. In weighing the balance between the public interest in the public being fully informed and the public interest in giving the government the necessary space to make decisions on what legal advice to obtain when and from whom, the public authority has had regard to the fact that the government is carrying out a cross-government programme of work to examine how Scotland contributes to and benefits from being part of the UK and how the rest of the UK benefits from its partnership with Scotland. As part of this, the government is publishing a series of papers based on robust evidence and analysis and evidence.<sup>2</sup> The first of these papers – *Devolution and*

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<sup>2</sup> <https://www.gov.uk/government/collections/scotland-analysis#documents>

*the implication of Scottish independence*<sup>3</sup> - was accompanied by the independent expert opinion from two leading authorities on the issue of State formation and international law: Professors James Crawford and Alan Boyle.

30. The independence of the advice of Professors Crawford and Boyle is underpinned by the neutral terms in which they were instructed, which are expressly set out in paragraphs 9 and 10 of their report as follows:

*9. Three departments of the UK Government – the Foreign and Commonwealth Office, the Cabinet Office and the Advocate General for Scotland – have jointly instructed us to advise in connection with the proposed referendum.*

*10. We are asked to advise on two questions:*

*10.1 the status of Scotland and the rUK in international law after Scottish independence, in particular '(a) the strength of the position that the rUK would be treated as a continuation of the United Kingdom as a matter of international law and an independent Scotland would be a successor state'; and*

*10.2 after Scottish independence '(b) the principles which would apply to determining the position of the rUK and an independent Scotland within international organisations, in particular the European Union.'*

31. Apart from the analysis the government has published, there is a substantial amount of material on the question of the implications of independence for Scotland's membership of the EU in the public domain, including in Chapter 6 of the Scottish Government's White paper on Independence.<sup>4</sup>
32. In light of the volume of information available to inform the public debate on Scottish independence, the public interest in knowing specifically whether the government's Law Officers have or have not advised and if they have, the terms of that advice, does not outweigh the public interest in maintaining the Law Officers' convention.
33. The complainant is mistaken in his interpretation of the SIC's Decision 111/2012 and the FOISA. The general entitlement to information under

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<sup>3</sup> <https://www.gov.uk/government/publications/scotland-analysis-devolution-and-the-implications-of-scottish-independence>

<sup>4</sup> <http://82.113.138.107/00439021.pdf>

FOISA is set out in section 1(1) of that Act. Section 2 FOISA provides that that entitlement is subject to the exemptions provided for by Part 2 FOISA. Section 16 FOISA then sets out the procedural requirements to be complied with where a Scottish public authority relies on one of the exemptions in Part 2 to refuse to give information it holds to the applicant. Section 16(1) requires a public authority to issue a refusal notice which:

- a. discloses that it holds the information,
  - b. states the claim that the information is exempt,
  - c. specifies the exemption, and
  - d. specifies why the exemption applies.
34. Section 18(1) FOISA applies to cases where, if information existed and was held by a Scottish public authority, any specified exemptions in Part 2 would apply (these are the exemptions in sections 28 to 35, 39(1) or 41) but the authority considers that revealing whether the information exists or is held would be contrary to the public interest. In those circumstances, whether or not the information does exist or is held need not be disclosed. A refusal notice can be given under section 18 and the requirements of section 16(1)(a) is specifically disapplied by section 18(2). A refusal notice under section 18 may only be given where one of the specified exemptions applies. To be able to issue such a notice, the Scottish public authority must have identified which exemption that is. Section 18(2) specifically disapplies the requirement of section 16(1)(a) but not the rest of section 16(1) and a section 18 refusal notice must therefore, specify which exemption applies. The SIC confirmed this in Decision 100/2013 (Mr Alistair Soan and the Scottish Ministers). The relevant part of the decision states:

*'15. When issuing a refusal notice under section 18(1), section 18(2) provides that neither sections 16(1)(a) or 16(2)(d) apply. This means that a refusal notice under section 18(1) does not need to confirm whether the public authority holds the relevant information, or set out the public authority's reasons for concluding that the public interest would favour maintaining the exemption(s) that would apply, if it were held.*

*16. The specific exclusion of these requirements of section 16(1) when issuing a refusal notice under section 18 strongly suggests to the Commissioner that the remaining requirements (sections 16(1)(b), (c) and (d)) must be fulfilled when issuing a refusal notice under section 18(1) (subject to section 16(3) FOISA, which removes the obligation to*



*make a statement under section 16(1)(d) if doing so would reveal exempt information).*'

35. The complainant is therefore wrong in his assertion that the SIC's Decision 111/2012 is to be read as a finding that none of the exemptions specified in section 18(1) FOISA applied to Ms Stihler's request. Ms Stihler asked the Scottish Ministers whether they had taken legal advice on the status of Scotland within the EU should Scotland choose to break away from the UK and, if so, whether she could be provided with a copy. In response to her request, the Scottish Ministers relied on the exemptions at sections 29(1)(a) (formulation of Scottish Administration policy etc) and 30(c) (prejudice to effective conduct of public affairs) FOISA as the basis for issuing a refusal notice under section 18 FOISA. The Scottish Ministers were required in their refusal notice to specify which exemption they relied on, and they did. It was for the SIC to consider on appeal from Ms Stihler whether section 18, when read with the exemptions relied on, had been correctly applied.
36. Accordingly, in assessing whether the Scottish Ministers were entitled to rely on section 18, the SIC considered whether both sections 29(1)(a) and 30(c) applied to the information Ms Stihler had requested. The SIC found that it did. However, the SIC also went on to find that the public interest was not in favour of maintaining the refusal notice issued under section 18. In other words, the Scottish Ministers were not entitled to refuse to reveal whether the requested information existed or was held by them.
37. There is nothing in the decision to indicate that the SIC's decision is based on a consideration of, or is relevant to, the application of section 18 FOISA as read with section 29(1)(c) FOISA. Furthermore, the decision is not binding on the government, but in any event it is distinguishable from this case. It was concerned with the disclosure of legal advice in general rather than disclosure of the position regarding Law Officer advice, and does not refer to the Scottish equivalent of section 35(1)(c) FOIA which is, section 29(1)(c) FOISA. The fact that the Scottish Government chose to reveal that it had consulted its own Law Officers is immaterial to the proper interpretation of the SIC's decision in Ms Stihler's appeal. It also does not imply that the government should reveal its position now.

#### *Balance of the public interest*

38. The Commissioner would initially like to stress that, regardless of the arguments put forward, he can only consider where the balance of the public interest lies in the public authority *confirming or denying* whether the government had sought and received advice from the Law Officers in connection with Scotland's future membership of the EU if it votes for

independence from the UK in the forthcoming referendum. In other words, does the balance of the public interest weigh in favour of, or against confirming or denying whether the public authority holds any information within the scope of the request? The Commissioner cannot therefore consider the public interest in favour of, or against *disclosure* in this case given that the public authority has not confirmed that it holds the requested information.

39. The Scottish independence referendum is clearly a matter of great constitutional significance with international ramifications for the UK. It is important that the public is kept well informed of the pros and cons of Scottish independence before those eligible cast their votes in the referendum in September. Knowing whether or not the government had sought and received advice from the Law Officers regarding the future membership of Scotland in the EU following independence is therefore in the public interest. Disclosing whether or not the government had obtained advice from the Law Officers would inform the debate regarding the government's position, if only marginally. Not knowing whether Law Officers' advice was sought is a missing piece of information which is relevant to the debate, so the Commissioner does not agree that the information already made available weakens the public interest in disclosing whether the requested information is held.
40. Nevertheless, there is a strong public interest in the government being able to have a safe space to seek and receive frank and candid advice from its legal advisers in confidence and free from external pressure in deciding what sort of legal advice to obtain, when and from whom. This strong public interest is reflected in the long-standing convention that neither the advice of Law Officers, nor the fact that their advice has or has not been sought, is disclosed outside government. Therefore, the Commissioner considers that there will always be a strong public interest in neither confirming nor denying whether the government has obtained advice from the Law Officers in relation to an issue. The Commissioner recognises the weight the section 35(1)(c) FOIA exemption attracts from the way it has been drafted by Parliament – providing a specific exemption for a particular type of legal advice. That weight is reinforced by the convention of non-disclosure adopted by successive governments.
41. It would be impossible for the Law Officers to advise on every aspect of government policy that has legal implications, given the range of legal advice that government requires. If the government routinely disclosed occasions on which the Law Officers had or had not given advice, that could give rise to questions as to why they had advised in some cases and not in others. This could put pressure on the government to seek their advice in cases where their involvement would not be justified. The risk of creating an impression that it is not confident of its legal position

regarding a particular issue could also deter the government from seeking the Law Officers in cases where their involvement would be justified.

42. The Commissioner does not therefore share the complainant's view that the extent of the safe space that the government requires to seek and receive advice from its most senior legal advisers should be limited before the referendum takes place in September. Rather, he considers that there is always a strong public interest in providing a safe space (free from external pressure) for the government to decide whether or not to seek advice from its Law Officers.
43. The complainant's analogy with the McCrone Report focusses on the non-disclosure of the report at the time. This case is not concerned with the non-disclosure of Law Officers' advice so in that sense the Commissioner does not consider that both circumstances are strictly similar. Therefore, although the Commissioner shares the view that both the government and the Scottish Government are more likely to put forward strong arguments in support of their respective positions, he believes that revealing whether or not the government has sought advice from the Law Officers would be of limited public interest in terms of the public being able to form better informed views on Scotland's future membership of the EU following independence or indeed on the broader question of Scotland's independence from the UK.
44. The Commissioner does not accept that the SIC's Decision 111/2012 extends to the application of section 29(1)(c) FOISA. He agrees with the public authority's interpretation of the decision. The Scottish Ministers relied on sections 29(1)(a) and 30(c) FOISA as the basis for issuing a refusal notice under section 18(1) FOISA. The exemptions at sections 29(1)(a) and 30(c) were applied because the Scottish Ministers considered that if they held information relevant to Ms Stihler's request, it would be exempt under those exemptions. However, they did not reveal whether the legal advice existed or was held by them on the basis of section 18(1). The SIC did not uphold the application of section 18(1). However, the effect of the decision was that the Scottish Ministers had to reveal whether the legal advice existed or was held by them and if held by them, to disclose it or issue a refusal notice under section 16 FOISA. The decision did not prevent the Scottish Ministers from subsequently relying on the exemptions in Part 2 FOISA including section 29(1)(c). Furthermore, the request was for legal advice and not specifically Law Officers advice.
45. Therefore, the Commissioner does not agree with the suggestion that the Scottish Government was compelled to disclose the fact that it had sought and received advice from its Law Officer on the question of Scotland's future membership of the EU following independence. In

addition to the fact that the SIC's decision in Ms Stihler's case was not specifically in relation to Law Officers' advice, the Scottish Government could have appealed the SIC's decision to the Court of Session. The Commissioner agrees with the public authority that the Scottish Government's decision to reveal that it had obtained advice from its own Law Officer does not imply that the UK Government should also reveal its position. Furthermore, the Scottish Government's decision is immaterial to the proper interpretation of the SIC's Decision 111/2012.

46. Having carefully considered the balance of the public interest arguments in the circumstances of this case, the Commissioner finds that the public interest in favour of confirming or denying whether the public authority held any information within the scope of the request does not outweigh the strong public interest in maintaining the exemptions at sections 35(1)(c) and 35(3).

## Right of appeal

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47. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

48. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**