

Decision Notice

Decision 121/2019: Mr N and the Scottish Ministers

Second independence referendum

Reference No: 201801813

Decision Date: 22 August 2019



Scottish Information
Commissioner

Summary

The Ministers were asked for briefings provided by civil servants and documents provided to Ministers on the topic of a second independence referendum.

The Ministers disclosed some information, but withheld some other information under various exemptions in FOISA.

During the investigation, the Ministers disclosed some additional information and amended the exemptions originally relied upon.

The Commissioner investigated and found that while the Ministers had correctly withheld some information, they had wrongly withheld some other information. He also found that some information, only identified during the investigation, should have been identified earlier. The Commissioner required the Ministers to disclose some further information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b)(i) and (c) (Prejudice to effective conduct of public affairs); 36(1) (Confidentiality)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 24 August 2018, Mr N made a request for information to the Scottish Ministers (the Ministers). The information requested was “details of any briefings by civil servants or documents provided to Ministers in 2017 or 2018 on the topic of a second independence referendum”.
2. The Ministers responded on 21 September 2018, disclosing some information within one document. The Ministers withheld some information under the following exemptions in FOISA:
 - section 25(1) (Information otherwise available), where the information was already available on the Scottish Government website, accessible via links provided by the Ministers;
 - section 30(b)(i) (Prejudice to effective conduct of public affairs), where disclosure would inhibit the ability of Ministers and officials to discuss and explore options in a private space, and where the public interest favoured non-disclosure; and
 - section 36(1) (Confidentiality), where the information comprised legal advice, disclosure of which was not in the public interest.
3. Later that day, Mr N wrote to the Ministers requesting a review of their decision on the basis that the public interest favoured disclosure, given the topic was a national referendum. Mr N argued that, as a minimum, the Ministers should identify the documents being withheld in order to establish whether the arguments in support of free and frank exchange of views

were merited. He also commented it was impossible to gauge the quantity of information being withheld or the parties who had corresponded.

4. The Ministers notified Mr N of the outcome of their review on 19 October 2019, upholding their original decision in full, broadly for the reasons given in their original response. The Ministers told Mr N how many documents had been withheld and explained that these had been provided by civil servants to Ministers as part of their normal duties.
5. On 22 October 2018, Mr N wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. Mr N stated he was dissatisfied with the outcome of the Ministers' review because he disagreed with their decision to withhold the information requested under the exemptions claimed (with the exception of section 25(1), which he did not challenge). In his view, the public interest in disclosure was paramount, and the public had a right to know if the Scottish Government was planning to hold a referendum on the most major of constitutional topics.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr N made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 21 November 2018, the Ministers were notified in writing that Mr N had made a valid application and were asked to send the Commissioner the information withheld from Mr N. The Ministers provided the information and the case was allocated to an investigating officer.
8. On 7 December 2018, the Ministers wrote to Mr N informing him they now also wished to rely on section 29(1)(a) (Formulation of Scottish Administration policy etc.) for some of the withheld information where, again, the public interest favoured non-disclosure.
9. Mr N subsequently confirmed to the Commissioner that, in addition to the exemptions in section 30(b)(i) and section 36(1), he was also dissatisfied with the Ministers' decision to withhold information under section 29(1)(a).
10. 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, with particular reference to the exemptions applied (as stated in paragraph 9 above).
11. As the Ministers were withholding information under exemptions that are subject to the public interest test, Mr N was also invited to comment on why he believed disclosure of the information was in the public interest.
12. During the investigation, on 19 February 2019, the Ministers provided Mr N with some information which they had previously withheld. At this time, they also changed their position, stating that they no longer wished to rely on section 30(b)(i) of FOISA to withhold any information, but were now seeking to rely on (variously) the exemptions in sections 29(1)(a), 30(c), 36(1) and 38(1)(b) (Personal information) to withhold the remainder.
13. As the Ministers were now withholding some information under exemptions not previously relied on, Mr N was invited to comment on his legitimate interest in obtaining any personal information withheld under section 38(1)(b), and on the public interest in disclosure of information now being withheld under section 30(c).

14. Both parties provided submissions to the Commissioner.
15. During the investigation, on 3 July 2019, the Ministers informed the Commissioner they had identified some additional information which fell within the scope of Mr N's request. The Ministers provided this to the Commissioner, together with their submissions for withholding some of that information under the exemptions in sections 30(c), 36(1) and 38(1)(b) of FOISA.
16. The following day, the Ministers informed the Commissioner that they had identified some further information falling within the scope of the request. The Ministers subsequently provided this to the Commissioner, together with their submissions for withholding some of that information under the exemptions in sections 29(1)(a) and 30(c) of FOISA.
17. On 17 July 2019, the Ministers disclosed some of the additional information (referred to in paragraphs 15 and 16 above) to Mr N, explaining to him why they considered the remainder to be exempt from disclosure under (variously) the exemptions in sections 29(1)(a), 30(c), 36(1) and 38(1)(b) of FOISA.
18. On 5 August 2019, Mr N made further submissions in relation to the redactions made to the additional information (referred to in paragraphs 15 and 16 above). He criticised the Ministers' approach to his FOI request and the failure to identify the additional information earlier.

Commissioner's analysis and findings

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

Information held

20. Under section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.
21. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information.
22. In order to ascertain whether all relevant information had been identified, the Ministers were asked to explain the steps they took to establish what relevant information they held and which fell within the scope of Mr N's request.
23. The Ministers explained that all material relating to the topic of a second Scottish independence referendum was held in a specific protected file in their electronic record and document management system (eRDM), to which access was strictly limited. This contained all policy documents relating to the public consultation on a draft Referendum Bill, subsequent policy consideration of the matter and email correspondence. The Ministers explained that a systematic review of all documents stored in the file was undertaken by officials and Scottish Government Legal Department (SGLD) lawyers to identify any

information falling within the scope of the request. SGLD lawyers also searched Outlook and papers held for any relevant information.

24. The Ministers confirmed they were satisfied that no further information falling within scope was held, given that no other teams within the Scottish Government had provided advice to Ministers on this subject.
25. The Ministers also explained that they now considered that the information in one of the documents originally identified did not fall within the scope of Mr N's request. This document, the Ministers explained, was a draft document which was never provided to, or used for the purpose of briefing, Ministers. The Ministers further explained that some of the information in this document was later incorporated into one of the other documents in the withheld information.
26. Following consideration of the withheld information (which indicated that further information falling within scope might be held), the Ministers were asked to ascertain whether they held any further information. As explained in paragraphs 15 and 16 above, at a late stage in the investigation, the Ministers confirmed that additional information had been identified which fell within the scope of Mr N's request.
27. Having considered these submissions and the terms of the request, the Commissioner accepts that, by the end of the investigation, the Ministers had taken adequate, proportionate steps in the circumstances to identify and locate any information relevant to Mr N's request. He is also satisfied with the explanation provided by the Ministers that the document referred to in paragraph 25 above falls outwith the scope of the request.
28. That being said, the information referred to in paragraph 26 should clearly have been identified by the close of the Ministers' review, at the latest. The Commissioner is surprised that it was not located until very late in the investigation, particularly given the high profile nature of the subject matter of the request for information. He wishes to emphasise the crucial importance of thorough searches being carried out in response to requests for information. In failing to do this, the Ministers failed to deal with the request fully in accordance with section 1(1) of FOISA.

The Ministers' change of position during the investigation

29. As explained above, during the investigation, the Ministers provided submissions to the effect that some information, originally withheld, could now be disclosed. This information had been withheld at review stage under the exemption in section 30(b)(i) of FOISA. The Ministers disclosed this information to Mr N on 19 February 2019.
30. The Ministers submitted that, in disclosing this further information, they wished to withhold the remainder under (variously) the exemptions in sections 29(1)(a), 30(c), 36(1) and 38(1)(b) of FOISA. The Ministers also confirmed they were no longer seeking to rely on section 30(b)(i) to withhold any information.
31. The Ministers provided no submissions, however, explaining why this information, now disclosed, was correctly withheld at the time it dealt with Mr N's request or requirement for review, so the Commissioner can only conclude that the Ministers were not entitled to withhold that information at that time (and therefore breached section 1(1) of FOISA in doing so).
32. The Commissioner will now consider whether or not the Ministers were entitled to rely on any exemptions claimed to withhold the remaining withheld information.

Section 38(1)(b) – Personal information

33. As explained above, during the investigation, the Ministers also sought to rely on the exemption in section 38(1)(b) of FOISA to withhold some personal information.
34. In his submissions to the Commissioner, Mr N stated that he was raising no dissatisfaction with any withheld personal information that did not relate to any of the Ministers themselves.
35. Following a full examination of the withheld information, it was established that none of the withheld personal information related to individual Ministers.
36. Taking these points into account, the Commissioner does not deem it necessary to consider any further the Ministers' decision to rely on section 38(1)(b) of FOISA to withhold any personal information.
37. The Commissioner will now consider whether or not the Ministers were entitled to rely on any of the other exemptions claimed to withhold the remaining withheld information.

Section 36(1) – Confidentiality

38. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. This includes communications subject to legal professional privilege. An aspect of legal professional privilege is legal advice privilege which, the Ministers argued, applied in this case.
39. Legal advice privilege applies to communications between legal advisers and their clients in which legal advice is sought or given. The following conditions must be fulfilled for legal advice privilege to apply:
 - (i) The communications must involve a professional legal adviser, such as a solicitor or an advocate. This may include an in-house legal adviser or an external solicitor engaged by the authority.
 - (ii) The legal adviser must be acting in his/her professional capacity, and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with his/her client.
40. The Ministers submitted that section 36(1) of FOISA applied to some of the withheld information, the content of which related to, or referenced, communications with in-house legal advisers acting in their professional capacity, where the Scottish Government was the client and where legal advice was being sought and provided.
41. The Ministers stated that the information was "either made or affected for the principal or dominant purpose of seeking or giving legal advice", and included material which evidenced the substance of those communications. In the Ministers' view, disclosure of information about the matters being considered by lawyers, the extent of their comments, and any issues identified for further consideration, would breach legal professional privilege.
42. Therefore, the Ministers were satisfied that all of the necessary conditions for legal advice privilege to apply were met.
43. The Ministers further believed that a claim to confidentiality could be maintained in legal proceedings as the correspondence in question was shared solely between the Scottish Government and its legal advisers. The Ministers confirmed that information had not been shared with anyone outside the Scottish Government and, as such, it was confidential at the

time they responded to Mr N's request and requirement for review, and continued to be so. The Ministers were therefore satisfied that legal professional privilege had not been waived.

44. Having considered the Ministers' submissions, together with content of the information and the circumstances under which it was sought and obtained by the Ministers, the Commissioner is satisfied that the information in question meets the conditions set out in paragraph 39 above and, therefore, is subject to legal advice privilege.
45. Information cannot be privileged unless it is also confidential. It must be information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. The claim must be capable of being sustained at the time the exemption is claimed: the information must possess the quality of confidence at that time, so it cannot have been made public, either in full or in a summary substantially reflecting the whole. The Commissioner is satisfied that the information in question remained confidential at the time the Ministers dealt with Mr N's information request and requirement for review (and that it remains so now).
46. The Commissioner is therefore satisfied that the exemption in section 36(1) of FOISA is engaged for this information.

Public interest test – section 36(1)

47. The exemption in section 36(1) is subject to the public interest test in section 2(1)(b) of FOISA.
48. In his application to the Commissioner, Mr N argued that the public interest was paramount, and the public had a right to know if the Scottish Government was imminently planning to hold a national referendum on the most major of constitutional topics, i.e. the maintenance or break-up of the United Kingdom.
49. In their submissions, the Ministers acknowledged the public interest in disclosure to promote openness and transparency, and to provide reassurance about the rigour of the legislative process. They further recognised that disclosure would assist public understanding of the policy formulation process in relation to a second independence referendum.
50. The Ministers considered the public interest in disclosure had already been substantially met by the publication of the Ministers' response¹ to the consultation on the draft Referendum Bill and the analysis² of the consultation responses. They further argued that, were a Bill introduced into the Scottish Parliament, the public interest they had identified above would be further satisfied in the course of that process.
51. However, the Ministers considered these factors to be outweighed by the significant public interest in maintaining confidentiality of communications between legal advisers and clients. They submitted that it remained important, in all cases, that lawyers were able to provide free and frank legal advice which considered and discussed all issues and options, without fear that the advice might be disclosed and potentially taken out of context. The Ministers argued that, in areas which were the subject of political debate (such as a second independence referendum), an expectation that legal advice could be released would inevitably lead to that advice being much more circumspect and therefore less effective.

¹ <https://www.gov.scot/publications/consultation-draft-referendum-bill-analysis-responses-scottish-government-response/>

² <https://www.gov.scot/publications/consultation-draft-referendum-bill-analysis-responses/>

52. The Ministers contended that there was a strong public interest in protecting the confidentiality of the information, to ensure that the Scottish Government could consider and take policy decisions in a fully-informed legal context, having received the legal advice in confidence.
53. While recognising that there was a public interest in disclosure, the Ministers argued that this was not sufficient to outweigh the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients.
54. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)*. Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
55. The Commissioner accepts that there is a considerable public interest in disclosure of legal advice, in terms of accountability and transparency, with respect to the formulation of legislation concerning a matter of such constitutional significance as a second independence referendum, thus allowing assessment of its content.
56. The Commissioner recognises that there will be occasions where the significant public interest in favour of withholding legally privileged communications may be outweighed by a compelling public interest in disclosing the information. In this particular case, he has given weight to the views of Mr N regarding the public interest in disclosure of information that would affect a large number of people, given that any legislation formulated for a second independence referendum would undoubtedly affect all of the people of Scotland.
57. The Commissioner would stress that his decision, in this case, has to be based on the public interest at the time the Ministers' considered Mr N's request and requirement for review. He recognises that this may change over time.
58. The Commissioner is conscious that a robust level of consideration must be applied when weighing up the public interest in disclosure of information concerning any constitutional issue. He recognises that any developments in this area will be subject to further public scrutiny but his decision must be made on the specifics of the case under consideration, key factors including the timing of the request and the information actually in existence at that time.
59. Having considered the public interest arguments on both sides, the Commissioner is not satisfied that the public interest in disclosure of this particular information was sufficiently compelling, given the timing of the request and requirement for review, to outweigh the strong public interest in maintaining the confidentiality of communications between legal adviser and client.
60. In conclusion, after careful consideration, the Commissioner is satisfied that the Ministers correctly withheld all of the information withheld under section 36(1) of FOISA.

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

61. Under section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. "Scottish

Administration" is defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff, and non-ministerial office holders of the Scottish Administration and their staff. In terms of section 29(4) of FOISA, and bearing in mind the timeframe of the request, "government policy" means the policy of the Scottish Administration.

62. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation, and when.
63. "Formulation" of government policy suggests the early stages of the policy process, where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy: it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
64. The Ministers submitted that the information related to ongoing policy formulation in relation to the development of a second Referendum Bill. Referring to the Scottish Government's published response³ to the public consultation undertaken on a draft Referendum Bill, the Ministers confirmed that no public commitment had been made on when or how legislation would be proceeded with.
65. The Ministers stated that developing any legislation on this matter was a wide-ranging active area of policy formulation, and included questions of timing as well as consideration of the scope of matters to be included in a Bill. These matters remained under consideration and decisions on these had not, as yet, been taken.
66. In respect of the further information identified on 4 July 2019, the Ministers submitted that this was advice written in 2017, when Ministers had announced their intention to seek a transfer of power to the Scottish Parliament to put beyond doubt the competence of the Scottish Parliament to legislate for a referendum on independence. As the UK Government did not agree to this at that time, this remains a live policy issue which is subject to further development and future inter-governmental engagement.
67. The Ministers submitted that they must have a reasonable expectation that advice on these live policy issues, which remain subject to considerable political debate, can be offered in private.
68. Having considered the information withheld under section 29(1)(a), the Commissioner accepts that it relates to the formulation and development of government policy and, therefore, that it falls within the scope of the exemption.

Public interest test – section 29(1)(a)

69. Section 29(1)(a) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner is therefore required 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.

³ <https://www.gov.scot/publications/consultation-draft-referendum-bill-analysis-responses-scottish-government-response/>

70. Mr N submitted that the Ministers' publicly stated goal was to seek Scottish independence, and their policy position on this was clear. As such, he questioned how disclosure of information on that topic could be considered exempt from disclosure. Mr N contended that the only way the information could be exempt was if it revealed something not already made public about the Scottish Government's position.
71. In Mr N's view, if the Scottish Government had changed, or was contemplating changing, policy on the principle at its very core, the public had a right to know as soon as possible, particularly given the magnitude of the subject matter. He submitted that the break-up of the current constitutional framework and the creation of a new state was an important topic, which had dominated public discourse in Scotland for the best part of a decade.
72. Mr N argued that, in terms of constitutional upheaval, a second independence referendum was only remotely rivalled by Brexit, and voting figures had shown a referendum on Scottish independence was more important to Scottish voters than Brexit.
73. Mr N submitted that the public interest lay in full disclosure of the information, given that the future make-up of the state impacted on many aspects of the lives of the people of Scotland. In Mr N's view, therefore, full knowledge about the timing and possibility of a second independence referendum was vital to every Scottish voter. He argued that, given the high level of interest in this topic, as demonstrated by the turnout at the last independence referendum, the public had a right to know.
74. The Ministers acknowledged the public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate.
75. The Ministers argued, however, that there was a greater public interest in ensuring high quality policy and decision making, and in the properly considered implementation and development of policies and decisions. In their view, Ministers and officials must be able to consider and rigorously debate all available options to fully understand their possible implications. As such, they considered there was no public interest in prematurely disclosing information that would seriously undermine internal debate, thus undermining the quality of the policy making process.
76. In respect of the further information identified on 4 July 2019, the Ministers recognised the public interest in openness, transparency and accountability, particularly as this information described the support to be provided by the Civil Service to assist in the delivery of Scottish Government policy, consistent with the terms of the Civil Service Code.
77. However, in line with their submissions at paragraph 75 above, the Ministers submitted that this included the need for Ministers to be fully apprised of the ways in which the Civil Service would support them to consider all available options.
78. The Commissioner has considered carefully the submissions made by both Mr N and the Ministers, together with the withheld information in question.
79. In the Commissioner's view, any change to Scotland's constitutional future is a matter of considerable and significant public interest, given that this would affect everyone in Scotland and, to some extent, the rest of the UK. He does not consider it unreasonable to conclude that the public interest in disclosing information about Scotland's constitutional future will be substantial.
80. The Commissioner recognises the public interest in ensuring that all options are explored and deliberated by the Ministers, which may require some private space to be afforded

where ideas can be considered and a range of views gathered. With an important constitutional issue such as Scotland's constitutional future, the Commissioner acknowledges that there is a strong public interest in allowing a degree of private space to enable options to be considered.

81. On the other hand, the Commissioner agrees that there is a substantial public interest in the disclosure of information that would contribute to transparency and accountability, allowing scrutiny of matters being considered in the process of policy formulation and development. This would assist the public in understanding the very important policy issues under consideration and the likely consequences of any decisions to be taken, which are matters of legitimate public debate.
82. The Commissioner must also take into account that the withheld information in this case relates to what was ongoing policy formulation and development, and was relevant in informing the Ministers' consideration and refinement of their policy position and the options available. As he has recognised above, there is a general public interest in allowing all options to be explored and debated by the Ministers in a private space.
83. The Commissioner considers Mr N's arguments on the public interest to be well-founded and has given due weight to these. However, on balance, he has concluded that there is a significant, and greater, public interest, as at the time of the request for information and review, in the Ministers being able to consider a range of options, some of which may be discarded or developed further in the later stages of policy development. For this reason, he is not persuaded (in all the circumstances of this case) that there is a sufficiently strong public interest favouring disclosure. He considers it is in the public interest that Ministers should be able to formulate their policy position fully, and consider all analysis and evidence, without being drawn into a public debate prematurely on matters which are still under consideration.
84. In all the circumstances of this case, the Commissioner has concluded that the public interest in disclosure of the majority of the information withheld under section 29(1)(a) is outweighed by that in maintaining the exemption. He concludes that the Ministers were therefore entitled to withhold the information under this exemption.
85. However, for the further information identified on 4 July 2019, the Commissioner is not persuaded by the public interest arguments put forward by the Ministers. In the Commissioner's view, disclosure of this information would be unlikely to undermine the Ministers' ability to explore and debate matters in a private space, as claimed by them. While he does accept that Ministers must be allowed (where appropriate) to explore and debate options in a private space, he does not agree that disclosure of this particular information would have the effect claimed by the Ministers in this regard.
86. The Commissioner has given full and careful consideration to this information and notes that it relates to a policy issue which remains live. As set out above, it describes the support to be provided by the Civil Service to assist in the delivery of Scottish Government policy. The Commissioner notes that the Ministers considered much of the further information identified on 4 July 2019 was capable of being safely disclosed. Having considered the remainder (being withheld), he can see nothing particularly surprising in its content and can identify no public interest in withholding it.
87. For this particular information, the Commissioner has concluded that the Ministers were not entitled to withhold it under section 29(1)(a) of FOISA, and requires it to be disclosed.

88. As previously stated in paragraphs 57-58 for section 36(1) above, the Commissioner would stress that his decision, in this case, has to be based on the public interest at the time the Ministers' considered Mr N's request and requirement for review. He recognises that this may change over time.

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

89. Section 30(c) of FOISA provides that information is exempt information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
90. The word "otherwise" distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
91. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers the harm in question would require to be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
92. The Ministers submitted that the exemption in section 30(c) applied as some of the information requested related to the analysis of public consultation responses, disclosure of which would lead to an unwarranted focus on the process of analysis undertaken. This, the Ministers believed, would be likely to undermine the credibility and authority of the final, published analysis of the consultation responses. In the Ministers' view, disclosure would prejudice substantially their ability to consult effectively, and to publish the outcome of such consultation, on such sensitive or controversial matters in future.
93. The Ministers also considered that disclosure of some other information, withheld under section 30(c), would reveal the source of legal advice. Revealing the source of the Scottish Government's legal advice on referendum options would, they argued, be likely to lead to conclusions being drawn from the fact that any particular lawyer has, or has not, provided advice, which would in turn be likely to impair the Government's ability to take forward its work on this topic. The Ministers argued that releasing information about the source of legal advice would also be a breach of the long-standing Law Officer Convention (reflected in the Scottish Ministerial Code) which prevents the Scottish Government from revealing whether Law Officers either have or have not provided legal advice on any matter.
94. The Commissioner has taken account of all of the relevant submissions together with the corresponding withheld information.
95. The Commissioner is not persuaded that disclosure of some of the information withheld under section 30(c) would cause (or be likely to cause) the harm envisaged by the Ministers. Indeed, he finds elements of the Ministers' submissions to be somewhat over-stated for some of the information, which is either factual or comments on information already disclosed or published.
96. The Commissioner notes, from the Ministers' submissions, that they consider disclosure of the information would not only cause undue focus on the analytical process and undermine

the final published analysis, but would also somehow prejudice their ability to consult effectively and publish the outcome of such consultations. However, he is not persuaded that disclosure of all of the information would have the effect claimed by the Ministers, particularly given that the analysis was published in June 2017, some time prior to Mr N's request.

97. Taking account of the level of detail already publicly available, therefore, the Commissioner is not persuaded, from the submissions he has received, that disclosure of some of the information withheld under section 30(c) would result in the harm claimed by the Ministers.
98. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of this information would, or would be likely to, prejudice substantially the effective conduct of public affairs. He does not believe such a conclusion can be reached on the basis of the arguments provided.
99. The Commissioner does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of some of the information withheld under this exemption.
100. Given that the Commissioner does not accept the application of the exemption for some of the information withheld under section 30(c), he is not required to consider the public interest test in section 2(1)(b) of FOISA for that information. As no other exemption has been claimed to justify the withholding of that information, the Commissioner requires the Ministers to disclose it to Mr N. He will identify that information to the Ministers along with this Decision Notice.
101. Turning to the remainder of the information being withheld under section 30(c), the Commissioner has considered the Ministers' arguments in relation to this particular information. This is information not captured by the published analysis of the consultation responses. While its disclosure would be unlikely to prejudice the ability to consult and publish outcomes in future (as claimed by the Ministers), the Commissioner considers it would be likely to cause undue speculation and detract from the published analysis of the public consultation in this case.
102. In relation to the withheld information concerning the source of legal advice, the Commissioner has considered the Ministers' arguments carefully. He acknowledges the importance of the Law Officer Convention and the risks posed by its breach.
103. As such, the Commissioner is satisfied that section 30(c) is engaged, in that disclosure would prejudice substantially, or would be likely to prejudice substantially, the effective conduct of public affairs, in the manner described by the Ministers.
104. As the exemption in section 30(c) has been found to apply to the remaining withheld information, the Commissioner is now required (for this information) to go on to consider the public interest test in section 2(1)(b) of FOISA.

Public interest test – section 30(c)

105. As noted above, the exemption in section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA.
106. In considering whether the public interest favoured disclosure, the Ministers recognised the public interest in transparency and accountability, and in informing public debate. This, the Ministers believed, was particularly relevant in aiding understanding of the way in which the Ministers use public consultation as a tool to formulate and develop policy, and the processes of analysis applied to consultation responses.

107. However, the Ministers considered these factors were outweighed by the public interest in allowing civil servants to comment on consultations in the knowledge that their views would not be made public, thereby ensuring Ministers have confidence in the process leading to the final published analysis.
108. In the Ministers' view, the public interest lay in ensuring Ministers could continue to undertake public consultations and analysis of the corresponding responses, in order to formulate and develop policy on sensitive or controversial matters.
109. The Ministers further considered there to be a strong public interest in enabling them to determine from whom they sought legal advice, without having to face external pressure or concerns that particular conclusions might be drawn from the fact that any particular lawyer, or group of lawyers, had (or had not) been asked to provide legal advice on a particular matter. They also considered there was no public interest in disclosing information of this nature which would breach the long-standing Law Officer Convention.
110. Mr N's public interest arguments for section 30(c) broadly followed those set out in paragraphs 70-73 above in respect of section 29(1)(a) and need not be replicated here.
111. The Commissioner has considered the submissions from both parties, along with the withheld information.
112. The Commissioner recognises that there is a significant public interest in transparency and accountability concerning matters related to the topic of a second independence referendum. He accepts that disclosure of this information would allow public scrutiny and assessment of the Ministers' consideration of the options available to them, thereby informing public debate, and satisfying the public interest in openness, transparency and accountability. To a large degree, however, the Commissioner considers this is met by the disclosure of some further information during the investigation, together with the information he has found not to be exempt (as set out above).
113. On the other hand, the Commissioner accepts that there is a significant public interest in Ministers ensuring they can conduct consultations without prejudice, and that there are times when individuals must be allowed to participate safe in the knowledge that their contributions will not be made public.
114. In the particular circumstances of this case, the Commissioner has identified no further public interest in disclosure of the source of legal advice. He accepts that there are public interest arguments of substance which support maintaining the position advanced by the Ministers (and arguments in relation to the Law Officer Convention).
115. The Commissioner has already acknowledged that disclosure of the information would, or would be likely to, substantially prejudice the effective conduct of public affairs. Having balanced the public interest arguments for and against disclosure, he is satisfied that, on balance, the public interest in maintaining the exemption in section 30(c) outweighs that in disclosure, in respect of this particular information.
116. The Commissioner therefore concludes that the Ministers were entitled to withhold the remaining information under the exemption in section 30(c) of FOISA.
117. As previously rehearsed in paragraphs 57-58 above, the Commissioner would stress that his decision, in this case, has to be based on the public interest at the time the Ministers considered Mr N's request and requirement for review. He recognises that this may change over time.

Other matters

118. In both his application, and in his submissions to the Commissioner, Mr N argued that disclosure of some basic details was the minimum he would expect from the Ministers, for example the type of document, the date, who the document was prepared by/for, document headings and a summary of contents. He made the point that it was difficult to argue for the disclosure of information when he did not know the nature or extent of the information being withheld.
119. The Commissioner notes that, in their review outcome, the Ministers confirmed the number of documents that had been withheld, and generic details of the corresponding parties. The Ministers also informed Mr N they could not disclose the information due to the exemptions they believed to be applicable.
120. The Commissioner would point out that the purpose of his investigation is to determine whether or not the Ministers were entitled to withhold the information requested. This includes full sight and consideration, by the Commissioner and his staff, of all of the information requested by Mr N. While the Commissioner sympathises with Mr N's position, he recognises that, in this case, it would be extremely difficult for Ministers to summarise the withheld information further, without revealing aspects of the content of that information being withheld under an exemption.

Decision

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

The Commissioner finds that the Ministers correctly withheld some information under section 29(1)(a), section 30(c) and section 36(1) of FOISA, and so complied with Part 1.

However, the Commissioner also finds that the Ministers wrongly withheld some other information at review stage under section 30(b)(i) of FOISA, and thereby failed to comply with section 1(1) of FOISA. Given that, during the investigation, the Ministers disclosed this information to Mr N, the Commissioner does not require the Ministers to take any action in respect of this failure.

The Commissioner also finds that, having changed their position during the investigation, the Ministers wrongly withheld some other information under section 30(c) of FOISA, and thereby failed to comply with section 1(1).

The Commissioner also finds that the Ministers wrongly withheld some further information under section 29(1)(a) of FOISA, and thereby failed to comply with section 1(1).

The Commissioner further finds that the Ministers failed to fully comply with section 1(1) of FOISA in only identifying some information after his investigation had started.

The Commissioner therefore requires the Ministers to disclose to Mr N the information found to have been wrongly withheld under sections 29(1)(a) and 30(c) of FOISA, by **7 October 2019**.

Appeal

Should either Mr N 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.

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

22 August 2019

Appendix 1: 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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;
- ...

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-
- (i) the free and frank provision of advice; or
- ...
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

...

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