

Decision Notice



Decision 111/2012 Catherine Stihler MEP and the Scottish Ministers

Legal advice: Scotland's membership of the European Union

Reference No: 201101968
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Scottish Information Commissioner

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Summary

In May 2011, Ms Stihler asked the Scottish Ministers (the Ministers) whether they had taken legal advice on the status of Scotland within the European Union (EU) should Scotland choose to break away from the United Kingdom and, if so, whether she could be provided with a copy. However, the Ministers refused to reveal whether they had such legal advice. Following a review, Ms Stihler remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner found that the Ministers had failed to deal with Ms Stihler's request for information in accordance with Part 1 of FOISA, by failing to reveal whether, as at the date they received her request, the legal advice existed or was held by them. If the information exists or is held, she required the Ministers to either provide the information to Ms Stihler or to issue a refusal notice, in terms of section 16 of FOISA, explaining why it is judged to be exempt from disclosure. If the information does not exist or is not held, she required the Ministers to notify Ms Stihler, in terms of section 17 of FOISA, that they do not hold the information.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 16(1) (Refusal of request); 17(1) (Notice that information is not held); 18(1) (Further provision as respects response to request); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(c) (Prejudice to effective conduct of public affairs)

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

Background

1. On 30 May 2011, Ms Stihler wrote to the Ministers in connection with legal advice regarding the status of Scotland within the EU should Scotland choose to break away from the United Kingdom. Ms Stihler asked the Ministers if any such advice had been given to them and, if so, whether the advice was publicly available. Ms Stihler also asked for a copy of any legal advice that had been given to the Ministers on this subject.



2. The Ministers responded on 4 August 2011, giving notice under section 18(1) of FOISA. Section 18(1) allows Scottish public authorities to refuse to reveal whether information exists or is held by them, where, if the information did exist and was held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt information under any of a number of specified exemptions *and* if the authority considers that to reveal whether the information exists or is held would be contrary to the public interest. The Ministers advised Ms Stihler that the exemptions in sections 29(1)(a) and 30(c) of FOISA would apply if the legal advice existed and was held by them.
3. On 18 August 2011, Ms Stihler wrote to the Ministers requesting a review of their decision. Ms Stihler commented that the public interest clearly favoured disclosure of the advice and suggested that the release of such advice was not without precedent. She stated that the people of Scotland deserve to know the full facts before any referendum should be held on Scottish independence.
4. The Ministers notified Ms Stihler of the outcome of their review on 16 September 2011, upholding their previous decision in full.
5. On 14 October 2011, Ms Stihler wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Ms Stihler had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

7. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions relating to it.
8. Ms Stihler was also asked by the investigating officer to provide submissions in support of her application. The submissions made by both Ms Stihler and the Ministers are summarised (where relevant) in the Commissioner's analysis and findings section below.



Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the submissions made to her by both Ms Stihler and the Ministers and is satisfied that no matter of relevance was overlooked.
10. Where a public authority has chosen to rely on section 18 of FOISA, the Commissioner must ensure that her decision notice does not confirm one way or the other whether the information requested actually exists or is held by the authority. As such, the Commissioner is unable to set out in full her reasons for coming to her decision.

Section 18 of FOISA

11. Section 18(1) of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. These circumstances are as follows:
 - a request has been made to the authority for information which may or may not be held by it;
 - if the information existed and was held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 39(1) or 41 of FOISA; and
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest
12. In this case, as noted above, the Ministers submitted that, if the requested information existed and was held by them, it would be exempt from disclosure under both sections 29(1)(a) and 30(c) of FOISA.
13. It is not sufficient, however, to claim that one or more of the relevant exemptions applies. Section 18(1) makes it clear that a public authority must be able to give a refusal notice under section 16(1) on the basis that the information is exempt information. Given that none of the exemptions listed in section 18(1) are absolute exemptions for the purposes of section 2(2) of FOISA, it is only by satisfying a dual test, i.e.:
 - that a relevant exemption applies and
 - having carried out the public interest test required by section 2(1)(b) of FOISA and having found the public interest to lie in maintaining that exemptioncan information be considered to be *exempt* information.
14. As such, the Commissioner will first go on to consider whether the Ministers could have given a refusal notice under section 16(1) in relation to the legal advice, if it existed and was held.



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

15. Under section 29(1)(a) of FOISA, information held by the “Scottish Administration” (defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish Administration and their staff) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that “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.
16. 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.
17. In her submissions to the Commissioner, Ms Stihler argued that the legal advice she had requested could not be considered to relate to the formulation of government policy. She submitted that the present Scottish Government has a clear policy in favour of Scottish independence, and it would favour that regardless of the terms or possibility of an independent Scotland’s membership of the EU.
18. Ms Stihler also submitted that the advice she was seeking was about the consequences of a policy, regardless of how it was developed, and not about the development of the policy itself.
19. In their submissions, the Ministers argued that any such legal advice would be about a topic which is a matter of developing policy, i.e. the Scottish Government’s policy on membership of the EU.
20. The Commissioner is satisfied, should any such legal advice exist and be held by the Ministers, that it would undoubtedly fall within the scope of section 29(1)(a), on the basis that it would relate to the formulation of the Ministers’ policy relating to an independent Scotland’s membership of the EU and their wider policy on constitutional change.
21. As noted above, the exemption in section 29(1)(a) is subject to the public interest test required by section 2(1)(b). This is addressed below.



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

22. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of 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 citing it to show what specific harm would be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
23. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers that 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.
24. In her submissions, Ms Stihler argued that the legal advice would not relate to the Scottish Government's conduct, or to public affairs over which it had any responsibility or control; rather, it related to opinions on what would happen if the Scottish people voted a particular way in the independence referendum. Additionally, Ms Stihler did not consider that disclosure of the advice could have a significantly disruptive effect on the way in which public authorities conduct their business.
25. In their submissions, the Ministers argued that, should the legal advice exist and be held by them, its disclosure would substantially prejudice the effective conduct of public affairs by pre-empting discussions and negotiations with the EU, the UK Government and other key stakeholders.
26. The Commissioner accepts the Ministers' arguments that disclosure of any such advice at this stage could be obstructive to future dialogue and negotiations with other parties and stakeholders concerning a matter of sensitivity, importance and significance. Accordingly, she is satisfied that, should any such information exist and be held by the Ministers, it would be exempt from disclosure under section 30(c) of FOISA on the basis that its disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs.
27. As with section 29(1)(a), the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA.
28. Both Ms Stihler and the Ministers provided generic submissions on the public interest test in respect of both exemptions, and these are summarised below.



The public interest test

29. In her submissions, Ms Stihler argued that it was overwhelmingly in the public interest to know what advice the Scottish Government holds about the circumstances of its stated policies. Ms Stihler considered it hard to conceive of a circumstance where it was more clearly in the public interest that information should be released.
30. Ms Stihler submitted that participants in the referendum must be fully informed of what they are voting for, and that it cannot be right for the Scottish Government to hold information about the consequences of its policy, but for the public to be unaware of it until after the policy is voted for or against.
31. In their submissions, the Ministers acknowledged that, should the legal advice exist and be held by them, it was likely that there would be a significant public interest in ensuring open, transparent and accountable government which endeavours to ensure that there would be no legitimate bars to future policy plans. The Ministers considered this was necessary to allow people to understand how and why decisions and actions have been developed and have taken place, and under what authority.
32. The Ministers also believed that there was a clear public interest in ensuring that decisions could be debated and taken in a fully informed context, and that it was necessary for ongoing policy discussions to be able to take place without selected parts of the information being released into the public domain before the Scottish Government itself was ready to discuss those issues. To do so, in the Ministers' view, could give the public a misleading perception of the Scottish Government's actual policy. The Ministers considered this would likely result in the debate being diverted from the substance of policy onto legal technicalities.
33. The Ministers also submitted that, because this is still an area of ongoing policy development, the Scottish Government must be given the space to develop and formulate views and policies before reaching a settled public view without fear that deliberations will be released which could close discussions on some options. The Ministers argued that the Scottish Government needs to be free to discuss all options among themselves, and that their candour in doing so would be affected by their assessment of whether the content of their discussions would be disclosed in the near future, especially when it might undermine or constrain the Scottish Government's view on an issue that is ongoing.
34. Additionally, the Ministers argued that there was a strong public interest in preserving some private space in which the Scottish Government could formulate and develop policy. They submitted that Ministers and officials need to be free to deliberate openly and frankly, and to enable the full exploration of all possible solutions, including those proposals that may not be broadly politically acceptable.
35. The Commissioner has considered carefully the representations made by both Ms Stihler and the Ministers when balancing the public interest both for and against disclosure of the legal advice under consideration, were it to exist and be held by the Ministers.



36. The application of the public interest test in this case is complex:
- The Commissioner must first consider the public interest in relation to each of the applicable exemptions in terms of section 2(1)(b) of FOISA. In respect of each exemption, she must consider whether the public interest in maintaining the exemption (i.e. in withholding the information, were it to exist) outweighs the public interest in disclosing it.
 - If, in relation to *both* applicable exemptions (section 29(1)(a) and section 30(c)), the Commissioner concludes that the public interest lies in favour of disclosure, she must conclude that the Ministers could not have given a refusal notice under section 16(1) and that, as a result, they were not entitled to refuse to confirm or deny whether the advice exists or is held.
 - If, in relation to *one or both* applicable exemptions (section 29(1)(a) and section 30(c)) the Commissioner concludes that the public interest lies in favour of maintaining the exemption (i.e. withholding the information, were it to exist), she must then go on to consider the public interest test in relation to section 18 and whether to reveal whether the information exists or is so held would be contrary to the public interest.
37. The Commissioner agrees with both Ms Stihler and the Ministers that, in relation to both applicable exemptions, there would be a significant public interest in disclosure of the information should it exist and be held by the Ministers. Any such information would contribute to openness and accountability, and would assist in informing the public of the legitimacy of policies and the consequences of policy decisions.
38. The Commissioner considers that disclosure of any such information could lead to more informed public understanding of the effect on the constitutional position of an independent Scotland regarding EU membership.
39. The Commissioner is aware that the Scottish Government is committed to a referendum on the matter of Scottish independence. In her view, the question of whether independence will result in Scotland automatically remaining a member of the EU, or automatically being excluded and having to apply for membership, could have a bearing on how people vote in the referendum, depending on how they view the consequences of either of these outcomes.
40. In the Commissioner's view, the disclosure of legal advice on this matter could, if it existed and was held by the Ministers, inform the public in making their choice in a referendum, and in participating in the referendum debate.
41. However, the Commissioner is required to consider the position as at September 2011, i.e. at the time the Ministers carried out a review of Ms Stihler's request. At that time, no exact date had yet been set for the referendum, although it had been suggested by the First Minister during the election campaign that the preferred option would be for the referendum to be held in the second half of the new Parliament.



42. The Commissioner accepts the Ministers' position that any such legal advice would concern a topic that would be in the early stages of policy development and would not represent a finalised or settled position. In the Commissioner's view, such advice, should it exist and be held by them, would be utilised for the purposes of considering options and discussing possible scenarios with a view to developing an informed position.
43. In the Commissioner's view, it is in the public interest that all options can be explored and considered candidly by the Ministers and that space should be afforded for doing so before reaching a settled public view. This would enable the Ministers to consider a range of options, some of which could be rejected or further developed in the future. In particular, the Commissioner considers it is in the public interest that Ministers should be able to develop and formulate policies fully, without being drawn into a public debate on matters that may never form part of their finalised policy position. In the Commissioner's view, this does not preclude the public from engaging with and influencing future policy development and the debate concerning the future constitutional position of Scotland.
44. Additionally, the Commissioner recognises that, in September 2011, the independence referendum was still some years away. In her view, the urgency of the need to understand the consequences of any legal advice obtained by the Ministers would be considerably less at that time (or even now) than it would be as the referendum approached.
45. Having considered all of the representations made by Ms Stihler and the Ministers, the Commissioner has concluded, taking into account the timing of the Ministers' review and the indicative timing of the referendum, that, at the relevant time, the public interest in disclosure of the advice (should it exist or be held by the Ministers) would have been outweighed by the public interest in maintaining the exemptions in both sections 29(1)(a) and 30(c) of FOISA.
46. In summary, the Commissioner is satisfied that the information under consideration, if it existed and was held by the Ministers, would fall within the scope of those exemptions. The Commissioner has also concluded that the public interest in disclosure of any such information would be outweighed by that in maintaining the exemptions and that, consequently, the Ministers would be entitled to withhold the information should it exist and be held by them.
47. Consequently, the Commissioner is satisfied, on the facts presented by the Ministers in this case, that the Ministers could give a refusal notice under section 16(1) of FOISA on the basis that the public interest in disclosure of the legal advice (if it existed and were held) would not be outweighed by the public interest in maintaining one or more of the exemptions in sections 29(1)(a) and 30(c) for the reasons already set out in paragraphs 37 to 46 above.

Conclusion on section 18

48. Having concluded that, if the legal advice existed and was held by them, the Ministers would have been entitled to give a refusal notice under section 16(1) of FOISA, the Commissioner is required also to consider whether the Ministers were entitled to conclude that to reveal whether the information sought by Ms Stihler existed or was held by them would be contrary to the public interest.



49. The Ministers provided the Commissioner with an explanation as to why they believed it would be contrary to the public interest to confirm or deny whether the relevant information existed or was held. The Commissioner is unable to set out these submissions in this decision, but she has considered them fully.
50. In her submissions, Ms Stihler argued that the Scottish Government has a commitment to open and transparent government, so refusing to confirm or deny whether it had taken advice on a matter of profound public policy was at odds with its own preferred approach. In Ms Stihler's view, it was hard to see what arguments could credibly be advanced in the cause of such secrecy. In her view, the information contained no threat to national security, it did not involve any on-going investigations, there were no matters of data protection and it did not involve any police matters.
51. Ms Stihler also pointed out that the issue was so much to the fore that the House of Commons Library had published a Standard Note¹ on this matter on 8 November 2011, highlighting the stance of the Scottish Government and contrasting other similar positions.
52. In the Commissioner's view, the role of FOISA is important not only in enabling transparency in information held by public authorities, but also in enabling transparency in information about process. In this case, whilst the Commissioner has concluded that, if the advice existed and was held by the Ministers, they would have been entitled to issue a refusal notice under section 16(1), the Commissioner considers that it is in the public interest to know the type of information that the Ministers were taking into account in developing policy in relation to such a significant issue as independence. While it is a matter for Ministers to take the approach they consider appropriate, this would enable interested parties to form their own opinions on the way in which Ministers develop policy and take decisions.
53. The Commissioner recognises that Ms Stihler's request was made at an early stage in the Government's development of its policy in relation to Scotland's potential membership of the EU. Nonetheless, the Commissioner considers there is a strong public interest in allowing the public to understand the process by which this policy would be formulated.
54. On balance, the Commissioner is not satisfied in this case that it would be contrary to the public interest for the Ministers to reveal whether the legal advice requested by Ms Stihler exists or is held by them. In particular, and as noted above, the Commissioner considers that there is a strong public interest in enabling scrutiny and better understanding of the procedure followed by the Ministers in their policy development processes.
55. Consequently, the Commissioner concludes that the Ministers were not entitled to refuse to reveal whether the requested information exists or is held by them in terms of section 18(1) of FOISA. The Commissioner has set out below the steps which she now requires the Ministers to take as a result of this conclusion.

¹ <http://www.parliament.uk/briefing-papers/SN06110>



DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Ms Stihler. 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.

The Commissioner therefore requires the Ministers to reveal to Ms Stihler whether the legal advice she requested existed or was held by them when they received her request. If the information was held, she requires the Ministers either to provide that information to Ms Stihler, or to issue a refusal notice in line with the requirements of section 16 of FOISA. If the information was not held, she requires the Ministers to issue a notice in line with the requirements of section 17 of FOISA.

The Commissioner requires the Ministers to take these steps by 21 August 2012.

Appeal

Should either Ms Stihler or the Scottish Ministers wish to appeal against this decision, there is an 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 notice.

Rosemary Agnew
Scottish Information Commissioner
6 July 2012



Appendix

Relevant statutory provisions [*delete where inapplicable*]

Freedom of Information (Scotland) Act 2002

1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority

...

- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.

...



17 Notice that information is not held

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

18 Further provision as respects responses to request

(1) 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.

...

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-

...

(c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

Decision 111/2012
Ms Catherine Stihler MEP
and the Scottish Ministers

