

# Decision Notice



Decision 146/2013 Paul Hutcheon of the Sunday Herald and the Scottish Ministers

Risk register relating to the constitutional referendum

Reference No: 201201516  
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## Summary

On 10 May 2012, Mr Hutcheon asked the Scottish Ministers (the Ministers) for all risk registers and risk assessments relating to their policy on holding a constitutional referendum. The Ministers withheld the information, and upheld this decision on review.

During the Commissioner's investigation, the Ministers release some parts of the withheld information. In respect of this information, the Commissioner found that the Ministers had wrongly applied the exemptions in section 29(1)(a) and section 30(b)(ii) of FOISA when responding to Mr Hutcheon's request for review.

The Commissioner found that the Ministers were entitled to withhold the remaining information under section 29(1)(a) of FOISA (formulation or development of government policy).

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) (Effect of exemptions); 29(1)(a) and (4) (Formulation of Scottish Administration policy etc.); 30(b)(ii) (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

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1. On 10 May 2012, Mr Hutcheon asked the Scottish Government to provide "all risk registers and risk assessments held in relation to the Scottish Government's policy on holding a constitutional referendum".
2. The Ministers responded on 21 June 2012, advising Mr Hutcheon that they had decided to withhold the information under sections 29(1)(a) and 30(b)(ii) of FOISA.
3. On 26 June 2012, Mr Hutcheon asked the Ministers to review their decision to apply these exemptions.



4. The Ministers notified Mr Hutcheon of the outcome of their review on 8 August 2012, confirming that, in their view, the exemptions had been correctly applied.
5. On 10 August 2012, Mr Hutcheon wrote to the Commissioner, stating that he 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 Mr Hutcheon 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.

## Investigation

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7. On 13 August 2012, the Ministers were notified in writing that an application had been received from Mr Hutcheon and were asked to provide the Commissioner with the information withheld from him (a risk register). The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. 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 about the information covered by the request and their reasons for withholding it.
9. The Ministers responded on 25 October 2012. Further correspondence with the Ministers took place during the investigation, leading to some parts of the withheld information being provided to Mr Hutcheon on 3 June 2012.
10. During the investigation, Mr Hutcheon expanded his views on why disclosure of the withheld information would be in the public interest.

## Commissioner's analysis and findings

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11. 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 her by both Mr Hutcheon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

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

12. 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 non-ministerial office holders of the Scottish Administration, and their respective staff) is exempt information if it relates to the formulation or development of government policy.



13. The Commissioner's view, as expressed in her briefing on the application of section 29<sup>1</sup> is that:
  - “formulation” suggests the early stages of the policy process, where the options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers; while
  - “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.
14. 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 then determine which of these should be translated into political action and/or legislation and when.
15. The Ministers applied section 29(1)(a) to all of the withheld information, which comprised a risk register relating to the proposed constitutional referendum. After examining the withheld information, the Commissioner is satisfied that it relates to the formulation or development of Government policy, and accordingly, the exemption in section 29(1)(a) of FOISA is engaged. The risk register was intended to provide Ministers with an overview of issues which they might have to consider in relation to the proposed referendum, with an assessment of the potential level of risk. The Commissioner accepts that this information was intended to assist Ministers and officials in formulating or developing policy in relation to the arrangements and issues associated with the referendum.
16. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on 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.

#### *The public interest test*

17. In relation to the public interest in disclosure of the information in the risk register, Mr Hutcheon commented that the referendum on independence is the biggest issue Scots have faced in 300 years. He believed that voters should be fully aware of the opportunities and the risks involved.
18. Mr Hutcheon disputed that disclosure would make civil servants more cautious in future, if the information was disclosed. He considered this argument to be speculative. He also took issue with the Ministers' description of the policy as “ongoing”, arguing that the general principles of the referendum were not ongoing, as the Edinburgh Agreement had been signed and there was a commitment to a plebiscite before the end of 2014.

<sup>1</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>



19. The Ministers recognised the public interest in ensuring transparency and accountability in relation to the government's decision making. They accepted that there was undoubted public, political and media interest in the development of legislative and practical arrangements for the referendum on independence to be held in 2014.
20. The Ministers considered that the public interest in disclosure was outweighed by the need for both Ministers and officials to have the space in which to fully discuss and develop policies. They commented that the draft Bill submitted to Parliament would be accompanied by a range of documents setting out the process undertaken by the Government in developing the legislative proposals and explaining any alternative proposals considered. They considered that, if the withheld information was to be released, officials would exercise an increased degree of caution in preparing such papers in the future. This would result in a qualitative change in the views expressed and the options and recommendations presented, and make it less likely that a full range of options would be put forward, particularly if some options were not necessarily in line with a stated policy or considered to be politically acceptable. As a consequence, the policy-making process would be less robust.
21. The Ministers provided other arguments supporting the view that disclosure of information relating to the early stages of policy making would not meet the long-term interest in mature policy making.
22. In relation to the specific information under consideration, the Ministers explained that the risk register was intended as a comprehensive note of issues which might or might not occur, developed in the interests of ensuring that all possibilities were covered. They reiterated that this was very much an ongoing area of policy which was still evolving and has not been fully implemented. They feared that certain arguments might be taken out of context, open to misinterpretation or perceived to be misleading, and that, on balance, the public interest lay in maintaining the exemptions they had applied.
23. In general terms, the Commissioner recognises the public interest in protecting the private space required for policy development, particularly when the policy is at the early stages of development and requires wide-ranging discussions of all options, some of which may later be discarded. In this case, the Commissioner might question whether the withheld information contains "advice" or "opinion" in the way which the Ministers' submissions suggest. However, the Commissioner accepts that the risk register presents a comprehensive range of issues and possibilities, with an assessment of associated risk or likelihood, and that this is necessary in order for Ministers to reach a fully considered policy position.
24. The Commissioner has considered Mr Hutcheon's argument that disclosure would help to ensure that voters are fully aware of the opportunities and the risks involved, in relation to a constitutionally significant referendum. The Commissioner has some sympathy with this view, but has taken into account the Ministers' commitment to provide the public with full information at a later stage in the legislative process associated with the Referendum Bill. Given this commitment and the fact that the risk register is intended to cover some possibilities which, in practice, are unlikely to occur, she finds that the public interest in protecting the policy-making process outweighs the public interest in disclosure of the full contents of the risk register.



25. During the investigation, the Commissioner asked the Ministers to consider releasing certain parts of the risk register which she felt would serve the public interest in transparency and in promoting public understanding of the policy-making process. The Ministers agreed to provide Mr Hutcheon with a copy of the risk register template, showing the categories of risks covered, and did so on 3 June 2013. They had earlier provided Mr Hutcheon with information about their general approach to risk management.
26. In relation to the information provided to Mr Hutcheon on 3 June 2013, the Commissioner finds that this could have been provided at the time of his request and that the information was wrongly withheld under section 29(1)(a) of FOISA when the Ministers responded to Mr Hutcheon's request for review. (The Ministers' decision to withhold this information under section 30(b)(ii) of FOISA will be considered later.)
27. The Ministers were also asked to consider disclosing certain other information from the risk register (issue number, likelihood and impact), but after consideration, they informed the Commissioner that they believed the exemption in section 29(1)(a) should continue to apply to this information.
28. The Ministers recognised that releasing this information would not divulge details of the individual risks themselves and how the Ministers planned to mitigate them, but argued that the high level of sensitivity relating to the referendum had led to journalists and others examining every piece of information in great detail and drawing their own conclusions. The Ministers considered that, from this, there was a risk that providing the information would cause significant harm, because journalists might interpret the information on numbers, likelihood and impact of risk as showing that there was a high level of risk associated with delivering the referendum, even though they would not know what those risks were or what actions were taken to mitigate them. This could lead to unfounded public concern about the Scottish Government's ability to deliver the referendum.
29. The Ministers also presented arguments similar to those already considered in this decision, that disclosure would lead to officials being more cautious and harm being caused to the process of successfully delivering the referendum or other similar projects in future.
30. After considering these arguments, the Commissioner accepted that, on balance, disclosure of this information in the circumstances that existed at the time of the request would not have been in the public interest, and that the Ministers were justified in withholding it under section 29(1)(a) of FOISA.

#### **Section 30(b)(ii) – Prejudice to effective conduct of public affairs**

31. As noted above, the Ministers agreed to provide Mr Hutcheon with some information from the risk register template during the investigation of his application to the Commissioner. The Commissioner must consider whether this information was correctly withheld under section 30(b)(ii) when the Ministers responded to Mr Hutcheon's request for review.

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32. In order to rely on this exemption, the Ministers must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
33. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit the free and frank exchange of views substantially. The inhibition must be substantial and therefore of real and demonstrable significance.
34. Given that the Ministers decided to release the information during the investigation, and did not put forward any submission showing why (for example) a change in circumstances had made it safe to release information where disclosure would previously have caused substantial inhibition, the Commissioner finds that the exemption was wrongly applied when the Ministers responded to Mr Hutcheon's request and request for review.

## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially failed to comply with the Freedom of Information (Scotland) Act (FOISA) in responding to the information request made by Mr Hutcheon.

The Commissioner upholds the Ministers' decision to withhold some information under section 29(1)(a) of FOISA. However, she finds that the Ministers failed to comply fully with Part 1 of FOISA by wrongly withholding certain information under section 29(1)(a) and section 30(b)(ii).

As this information has now been provided, the Commissioner does not require the Ministers to take any further action in relation to Mr Hutcheon's request for information.

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## Appeal

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Should either Mr Hutcheon 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.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**22 July 2013**



## Appendix

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### 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.

...

- (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 –

- (a) the provision does not confer absolute exemption; and  
(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;

...

- (4) In this section-

"government policy" means-

- (a) the policy of the Scottish Administration; and

...



**30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

(b) would, or would be likely to, inhibit substantially-

...

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

...