

Decision Notice



Decision 184/2013 Mr Tom Gordon and the Scottish Ministers

Scottish Oil Fund

Reference No: 201300277

Decision Date: 21 August 2013

www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

On 16 October 2012, Mr Gordon asked the Scottish Ministers (the Ministers) for information regarding the Scottish Oil Fund. The Ministers disclosed some information and withheld the remainder under section 29(1)(a) (formulation and development of policy) and section 30(b)(i) (substantial inhibition to the free and frank provision of advice) of FOISA.

During the investigation, the Ministers argued that some of the information was exempt from disclosure under section 25(1) of FOISA, being “otherwise accessible” to Mr Gordon. They also located additional information falling within the scope of Mr Gordon’s request, but did not cite any exemptions or disclose it to Mr Gordon.

Following an investigation, the Commissioner found that the exemptions cited by the Ministers did not apply and she ordered the Ministers to disclose the information to Mr Gordon. She also ordered them to disclose the information in relation to which no exemption had been applied.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 25(1) (Information otherwise accessible); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b)(i) (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. In July 2009, the Scottish Government published a discussion paper “An Oil Fund for Scotland: Taking forward our National Conversation”¹, which discussed the *feasibility* of establishing an oil fund for Scotland. A Scottish oil fund would involve the government choosing to save and invest a portion of the tax revenues generated from the country’s oil and gas sector for future generations, and not use this portion to fund current government expenditure.

¹ <http://www.scotland.gov.uk/Publications/2009/07/28112701/0>



2. On 16 October 2012, Mr Gordon asked the Ministers for “all items of information held by the Scottish Government in relation to the feasibility of a potential development of a Scottish Oil Fund which have been generated since the Scottish Government published the discussion paper An Oil Fund for Scotland on 30 July 2009.” (This report is referred to as the “Oil Fund Report” in this decision.)
3. The Ministers responded on 13 November 2012. They disclosed some information and withheld the remainder as they considered it to be exempt from disclosure.
4. On 22 November 2012, Mr Gordon requested a review of the Ministers’ decision. Mr Gordon considered that the exemptions did not apply and that there was a great public interest in the disclosure of the withheld information.
5. The Ministers notified Mr Gordon of the outcome of their review on 17 January 2013. The Ministers upheld their previous decision without amendment.
6. On 23 January 2013, Mr Gordon 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.
7. The application was validated by establishing that Mr Gordon made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

8. On 4 February 2013, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
9. 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
10. The Ministers responded to this request, providing submissions in support of their decision to withhold the requested information. During the investigation, the Ministers confirmed that they were relying upon sections 29(1)(a) and 30(b)(i) of FOISA to withhold the information.



11. In further discussions with the investigating officer, the Ministers confirmed that some of the information they had previously considered to be exempt from disclosure had been published elsewhere or had been disclosed in their initial response to Mr Gordon and was therefore otherwise accessible to him, in line with section 25(1) of FOISA. The Ministers contacted Mr Gordon on 27 June 2013, advising him where, within the Oil Fund Report, he could find some of the information that had previously been withheld. The Ministers did not inform Mr Gordon that some of the information disclosed in the initial response was also duplicated within the withheld information.

Commissioner's analysis and findings

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

Information falling in scope

13. Information was withheld in four documents.
14. The Ministers considered that only parts of documents 1, 2 and 3 and a single paragraph of text in document 4 fell within the scope of Mr Gordon's request. During the investigation, the Commissioner advised the Ministers that she considered that all of the information contained within documents 1, 2 and 3 fell within scope. The Commissioner considered that the Ministers had too narrowly interpreted the request as a request seeking information "about", rather than the wider request for information "in relation to". The Commissioner agreed with the Ministers that only a single paragraph of text within document 4 fell within scope of the request.
15. In their submissions, the Ministers stated that, if the Commissioner concluded that the information in question fell within scope, then they considered it should not be withheld. The Ministers did not go on to provide the information to Mr Gordon.
16. As the Ministers have not applied any exemption to the information initially considered to fall outwith the scope of the request, but which the Commissioner finds to be within its scope, the Commissioner has concluded that the Ministers failed to comply with section 1(1) of FOISA by withholding this information when responding to Mr Gordon's request and request for review.



Section 25(1) – Information otherwise accessible

Information disclosed in response to the initial request

17. During the investigation, the Ministers confirmed that the information which had been provided to Mr Gordon in their initial response to his request, but which was also duplicated within the withheld documents, was considered otherwise accessible to Mr Gordon by virtue of section 25(1) of FOISA and that they were no longer relying upon sections 29(1)(a) and 30(b)(i) of FOISA to withhold this information.
18. The Commissioner is disappointed to note that the Ministers did not identify that they were withholding information which they had already disclosed to Mr Gordon until after the investigating officer pointed this out and provided them with annotated copy of the documents.
19. The Commissioner finds that the exemption in section 25(1) of FOISA did not apply at the time of Mr Gordon's request for review. Although the information was in the public domain or contained in documents which had already been sent to him, Mr Gordon had not been informed of this (the Ministers themselves being unaware of the position) and, therefore, the information was not reasonably accessible to him.
20. The Ministers initially applied the exemptions in sections 29(1)(a) and 30(b) of FOISA to information which was later found to be duplicated in documents already released in response to Mr Gordon's request. The Commissioner finds that the Ministers wrongly applied these exemptions to this information and, in doing so, failed to comply with Part 1 of FOISA.

Information published in the Oil Fund Report

21. During the investigation, the Ministers accepted that the Oil Fund Report contained some information which was duplicated in the documents withheld from Mr Gordon.
22. The Commissioner is again disappointed to note that the Ministers did not identify this published information within the withheld documents, until after the investigating officer pointed it out and provided them with an annotated copy of the documents.
23. When the Ministers were told that some of the information they had withheld was already accessible to Mr Gordon, they accepted that, in the circumstances, the appropriate exemption to apply would have been section 25(1) of FOISA.
24. As noted above, the Ministers initially applied the exemptions in sections 29(1)(a) and 30(b) of FOISA to information which was later found to be duplicated in documents already released in response to Mr Gordon's request. The Commissioner finds that the Ministers wrongly applied these exemptions to this information and, in doing so, failed to comply with Part 1 of FOISA.



Section 30(b)(i) – free and frank provision of advice

25. The Ministers withheld information covered by Mr Gordon's request under section 30(b)(i) of FOISA. In order for the Ministers to rely on this exemption, they must show that the disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.

The Ministers' submissions

26. In their submissions, the Ministers argued that it is necessary to ensure free and frank communication can take place within the Scottish Government. Establishing a position on any issue generally takes time to develop and, particularly for the most important issues, is likely to be the result of vigorous discussion, debate and exchanges of views between a range of stakeholders. The Ministers considered that officials should be able to express and debate their views and those of others frankly and confidentially so that arguments and analysis could be thoroughly tested and understood.
27. The Ministers considered that substantial inhibition to the free and frank provision of advice would result from disclosure of the information. The implementation of a Scottish oil fund post-independence would represent a substantial change in the operation of Scotland's macroeconomic framework, so Scottish Government officials were required to brief and advise Ministers on a new and developing area of policy. The Ministers explained that the information had not been drafted with the intention of it being used in the final presentation of the policy and that further work would be required in due course, once the Ministers had decided to ventilate issues and to seek views, or had a settled Government policy and were ready to announce it.
28. The Ministers commented that the papers were written with the aim of providing free and frank background information to help inform the Ministers on this policy area. The Ministers stated that release of the information could substantially inhibit officials from providing advice or views for deliberation on this policy area in future, as early release would lead to an increased degree of caution in preparing such papers in future. This meant that there would be a qualitative change in the views expressed, the options offered, the recommendations made and the substance of the information contained in those papers. They considered it far less likely that a full range of options would be put forward by officials. In addition, the Ministers considered that fear over potential release might incline officials to play down or even ignore any concerns they might have otherwise raised.
29. The Ministers were asked to be specific about the possible inhibition that disclosure would cause. In response, the Ministers stated that, if the information was released before they had reached a settled view on the options available, it was far less likely that a full range of options would be put forward, or at least written down, as the policy was taken forward. This would be particularly true when not all options would necessarily be in line with existing policy or be considered to be politically acceptable (as with the analysis pertaining to a Scottish oil fund), which would create uncertainty and confusion if released into the public domain prematurely. In addition, concern over the effect of releasing documents might lead officials to understate or set aside legitimate and important concerns about the development of an oil fund.



30. The Ministers commented that the officials providing the advice would be particularly cautious in how they present their analysis in future (on both the oil fund and on other high profile topics on which they provide advice) if the information was disclosed. The Ministers considered this was likely to lead to more advice being provided orally instead of being written down, which would be harmful to the process of developing policy on key topics, such as those linked to constitutional reform which require expert advice. Ministers and senior managers would not have a sufficiently full and comprehensive picture of all the options.
31. The Ministers stated that they planned to publish a paper later in 2013 setting out how the oil fund would operate. The withheld information would form the basis of this work, and it was envisaged that the published paper would address many of the issues raised in the withheld documents. The Ministers considered that the expectation that a further paper or papers will be published in the next six months or so created a further argument for not releasing internal papers providing advice to Ministers.

Commissioner's conclusions on section 30(b)(i)

32. The Commissioner notes that well in excess of a third of the information originally withheld can be found in the published Oil Fund Report; the public nature of this information has been noted above. The remaining withheld information develops the options considered in the Oil Fund Report. It is a factual consideration of the various options, and their pros and the cons, to assist Ministers in coming to a conclusion.
33. The main consideration in determining whether the exemption in section 30(b)(i) of FOISA applies is not whether the information constitutes the provision of advice, although this will be relevant in some cases, but rather whether the release of the information would, or would be likely to, have a substantially inhibiting effect on the free and frank provision of advice. In this connection, it is essential that authorities can demonstrate a real risk or likelihood that actual harm will occur at some time in the near (certainly the foreseeable) future, not simply that harm is a remote possibility. Also, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow. The word "substantial" is important here: the degree to which a person will or is likely to be inhibited in expressing themselves has to be of some real and demonstrable significance.
34. Guidance issued by the Commissioner² states that where advice is communicated and received as part of individuals' expected day-to-day professional functions, then the risk of substantial inhibition resulting from the release of that information will be diminished.
35. The Ministers provided detailed arguments as to why they considered officials would be substantially inhibited by disclosure of the information. The Commissioner notes their views on the sensitivities of the topic under consideration, but has not been convinced by the Ministers' arguments. The withheld information comprises a series of options about how to invest monies from an oil fund, but does not propose one preferred option, instead putting forward analysis and views on the likely outcome and implications of each option.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>



36. The Commissioner has considered carefully the Ministers' comments with regard to the likelihood of inhibition to the advice under consideration in this case. The Commissioner accepts that the possibility that advice might be disclosed might lead officials to take care in recording their advice, and to pay more attention to the manner in which advice is expressed.
37. However, the issue is whether the effect would be adverse, by causing, or being likely to cause, officials to be substantially inhibited in the provision of free and frank advice. If the effect of disclosure was simply to increase the care taken by officials when offering advice, to ensure they are justifiable and measured and provide an accurate representation of the issues being addressed, then this is unlikely to be an adverse effect and would not cause substantial inhibition.
38. The Commissioner also notes the Ministers' comment that if the withheld information was disclosed officials would be more reticent in the future in providing advice and would do so orally as opposed to it being written down. The Ministers have not provided any evidence to support this assertion, and so it is difficult for the Commissioner to accept that this will be the outcome. The Commissioner considers that the officials who drafted the withheld papers did so as part of their professional duties, and it is therefore considered that such papers were thoroughly reviewed before they were submitted. The Commissioner considers that the preparation of such papers is a part of the normal duties of the officials concerned and, without evidence to back up such an assertion, she has concluded that it is highly unlikely that these officials would change their practices.
39. In this case, the Commissioner does not believe that disclosure would, or would be likely to, have the substantially inhibiting effect envisaged by the Ministers, particularly given that the withheld information does not contain a detailed analysis of the options, but rather, a development of the options presented in the Oil Fund Report.
40. As noted above, the Ministers have advised the Commissioner that they intend to publish further information on the consideration of these options in 2013. They have not explained why publishing this additional information will not substantially inhibit officials in their provision of advice.
41. Having considered all of the above, the Commissioner is not satisfied that the disclosure of the withheld information would (or would be likely to) substantially inhibit officials from providing such advice in the future.
42. She therefore finds that the Ministers incorrectly applied the exemption in section 30(b)(i) of FOISA to the withheld information.
43. As the Commissioner is not satisfied that the exemption in sections 30(b)(i) of FOISA has been engaged, she is not required to go on to consider the public interest test in section 2(1)(b).



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

44. 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.
45. The Commissioner’s view, as expressed in her briefing on the application of section 29³ 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.
46. 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 translate into political action and/or legislation and when.
47. The Ministers applied section 29(1)(a) to the remaining withheld information, which largely consisted of briefings to Ministers, regarding the various options as laid out in the Oil Fund Report.
48. At the time of the request, the Ministers had stated publicly that they wish to establish a Scottish oil fund after independence, once fiscal conditions allow. The information relates to the development of this policy (how to save and invest a portion of the tax revenues generated from the oil fund).
49. The Ministers explained that the papers withheld were created as part of the on-going process of developing the Scottish Government’s position on the operation of an oil fund. They set out a range of different strategies which could be used to transfer revenues into an oil fund. In doing so, the papers illustrate the advantages, disadvantages and viability of different approaches to implementing the policy. This analysis forms an integral part of the development of the policy and the manner in which an oil fund would operate. Not all of the proposals in the documents will be taken forward, but it is a necessary part of policy development to examine all options in order to give the Ministers a full range of information about their policy choices before they determine the preferred way forward.

³ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>



50. Having considered the withheld information, the Commissioner is satisfied that it relates to the formulation or development of Government policy and, accordingly, that the exemption in section 29(1)(a) of FOISA is engaged. The withheld information provides the Ministers with a range of options as to how an oil fund could be invested. The Commissioner accepts that this information was intended to assist Ministers and officials in formulating or developing policy in relation to the consideration of the oil fund.
51. 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

Ministers' public interest submissions

52. The Ministers recognised a public interest in ensuring transparency and accountability in the decision making of government. They also acknowledged the undoubted public, political and media interest in the development of policy arrangements surrounding the management of revenues from Scotland's oil reserves in the event of a "yes" vote in the independence referendum.
53. As noted above, the Ministers plan to publish a further paper or papers in due course setting out the Government's position and explaining how it has been arrived at. The Ministers considered that there is a need, in the meantime, for both Ministers and officials to have the space in which to fully discuss and develop policies without the need for considering whether the subsequent publication of such information may lead to misunderstandings of the Government's position or policies.
54. The Ministers stated that it is important that consideration can be given to all possible options and outcomes and that Ministers and officials can discuss and debate these freely in order to reach a considered decision, policy or way forward. If the withheld information was disclosed, it could limit the range of options considered, rendering the policy-making process less robust.
55. The Ministers considered that, if it were generally understood that positions set out in policy papers - particularly drafts - were to be released at an early stage of the debate, the way in which these positions might be interpreted by the public would have a stronger influence on the way policy is developed than the more considered approach looking at a full range of options. In addition, Ministerial decisions may ultimately be influenced by external factors not fully articulated in the recorded discussion. The Ministers therefore suggested that early or premature release would not meet the longer term public interest in mature policy making.



56. The Ministers reiterated that the withheld information relates to an area of policy which is still evolving and which has not yet been fully discussed, considered or implemented. Therefore, were this policy information to be released while the policy on an oil fund remains a 'live' issue, it is possible that analysis and arguments may be taken out of context, misunderstood, or used to create uncertainty about the Government's intentions which, particularly in a key industrial sector such as the North Sea, would not be in the public interest. The Ministers stated that it would be inappropriate to put the content of these discussions and debates into the public domain when further consideration and change is likely to be required, and when the Government has not reached the stage where it wishes to seek views or explain its position.

Mr Gordon's public interest submissions

57. In his application to the Commissioner, Mr Gordon noted that the Finance Secretary John Swinney wrote in the foreword to the Oil Fund Report: "The Scottish Government proposes that a proportion of Scotland's oil and gas revenues are invested directly into a Scottish oil fund". Mr Gordon considered that this is an issue of great public interest in advance of the independence referendum, especially as the economy of an independent Scotland (and oil's part in it) is of fundamental importance in that debate.
58. Overall, Mr Gordon considered there to be a substantial public interest in disclosure of the information sought and that this would considerably outweigh any "in-house government" considerations.

Commissioner's view

59. The Commissioner has considered carefully the representations made by both Mr Gordon and the Ministers when balancing the public interest both for and against disclosure of the information pertaining to the feasibility of a Scottish oil fund.
60. In the Commissioner's view, the disclosure of the options for the investment of an oil fund would inform the public in making their choice in a referendum, and in participating in the referendum debate. The Commissioner considers that disclosure of the withheld information could lead to more informed public understanding of the effect on the constitutional position of an independent Scotland regarding the feasibility of an oil fund.
61. The Commissioner is required to consider the position as at October 2012, i.e. at the time the Ministers carried out a review of Mr Gordon's request. At that time, no exact date had 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.
62. The Commissioner accepts the Ministers' position that the consideration of the options for the investment of an oil fund was in the early stages of policy development and would not represent a finalised or settled position. In the Commissioner's view, such information would be used to consider options and discuss possible scenarios with a view to developing an informed position.



63. The Commissioner believes 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 enables 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 the 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.
64. However, the Commissioner considers that, following publication in the Oil Fund Report of the initial outline of the options for the investment of the oil fund, on balance it is in the public interest for the additional commentary on these options to be disclosed. To publicly disclose some information on the options, but refuse to disclose the remainder seems inconsistent with regard to public interest, especially as the Ministers have stated that a further paper will be published in 2013. It has not been made clear to the Commissioner what difference a year will make to the debate, with Mr Gordon's request being submitted in October 2012 and the paper to be published in late 2013. Consequently, if the Ministers consider that it is in the *public interest* for a paper to be published later in 2013, then there does not seem to be a barrier to disclosure of the withheld information before then.
65. The Commissioner has weighed the public interest in disclosing or withholding the information withheld from Mr Gordon, taking account of all the circumstances of this case. While recognising that there will usually be scope for an authority to mitigate the potential for information being taken out of context, she has concluded that disclosure of the withheld information, at the time the Ministers were dealing with Mr Gordon's request and request for review, would not have been likely to harm the policy-making process.
66. Having considered all of the representations made by Mr Gordon 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 withheld information outweighed the public interest in maintaining the exemption in section 29(1)(a) of FOISA.

Information to be disclosed

67. As the exemptions do not apply to the withheld information, the Commissioner requires the Ministers to disclose the withheld information to Mr Gordon.
68. To assist Mr Gordon in his understanding of the disclosed information, complete copies of documents 1, 2 and 3 should be disclosed to him. In document 4, only a single paragraph of text fell within the scope of the request, and this single paragraph should be disclosed.



DECISION

The Commissioner finds that the Scottish Ministers failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) (in particular with section 1(1)) in responding to the information request made by Mr Tom Gordon by:

- (1) withholding information under sections 29(1)(a) and 30(b)(i) of FOISA;
- (2) failing to disclose information to Mr Gordon which fell within the scope of his request, but which the Ministers did not consider to be exempt from disclosure;
- (3) withholding information (during the investigation) on the basis that it was exempt from disclosure under section 25(1) of FOISA.

The Commissioner requires the Ministers to provide Mr Gordon with the information set out in paragraph 68 above, by 7 October 2013.

Appeal

Should either Mr Tom Gordon 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
21 August 2013



Appendix

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 –

...

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

...

25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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

...

...