

# Decision Notice



Decision 208/2012 Tavish Scott MSP and the Scottish Ministers

Removal of education from local authority control

Reference No: 201200879

Decision Date: 13 December 2012

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**Rosemary Agnew**

Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

On 17 February 2012, Tavish Scott MSP (Mr Scott) asked the Scottish Ministers (the Ministers) for information about discussions which had taken place about removing education from local authority control or placing it under the control of a centralised body. The Ministers withheld the information, arguing that it related to the formulation of government policy and was therefore exempt from disclosure.

Following an investigation, the Commissioner agreed that the information was exempt from disclosure under section 29(1)(a). She did not require Ministers to take any action.

## Relevant statutory provisions

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

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 17 February 2012, Mr Scott asked the Ministers the following:
  - a. What communications and discussions (content, persons involved, dates, conclusions or recommendations etc.) have taken place relating to the removing of education from local authority control?
  - b. What communications and discussions (content, persons involved, dates, conclusions or recommendations etc.) have taken place relating to placing education under the control or increased control of a centralised body?
2. The Ministers responded on 16 March 2012. In their response, the Ministers advised Mr Scott that they considered the information he had requested to be exempt from disclosure in terms of sections 29(1)(a) (Formulation of Scottish Administration policy etc.) and 30(c) (Prejudice to effective conduct of public affairs) of FOISA.



3. On 22 March 2012, Mr Scott wrote to the Ministers requesting a review of their decision. Mr Scott suggested that the Ministers had incorrectly applied the public interest test and argued that his constituents had the right to know the Scottish Government's plans for the future of education.
4. The Ministers notified Mr Scott of the outcome of their review on 27 April 2012. In their review, the Ministers upheld their original decision without amendment.
5. On 2 May 2012, Mr Scott 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 Scott 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 15 May 2012, the Ministers were notified in writing that an application had been received from Mr Scott and were asked to provide the Commissioner with the information withheld from him. 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers responded on 16 July 2012. They now considered that all but one of the 18 documents provided to the Commissioner fell outwith the scope of the request, while the single document remaining within the scope of the request was already in the public domain and was therefore exempt in terms of section 25(1) of FOISA (Information otherwise accessible).
10. In later correspondence with the investigating officer, the Ministers recognised that some of the information previously provided to the Commissioner was in fact within the scope of Mr Scott's request, contrary to their earlier views. They provided submissions in relation to this information, setting out their arguments in support of applying the exemptions in sections 29(1)(a) and 30(c) of FOISA.
11. The relevant submissions received from both the Ministers and Mr Scott will be considered fully in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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

### Scope of the request

13. As noted above, having reviewed all of the withheld information, along with the Ministers' submissions, the Commissioner disagreed with the Ministers' assessment that only one of the documents contained information that was within the scope of Mr Scott's request. The Commissioner considered that sections within a number of the documents contained information that was in scope, and the Ministers were advised accordingly.
14. In response, the Ministers appeared to accept the Commissioner's approach and provided submissions supporting their earlier view that the exemptions contained in section 29(1)(a) and 30(c) of FOISA applied to any information that fell within the scope of Mr Scott's request, with the exception of one document to which Mr Scott has accepted that the exemption in section 25(1) of FOISA applied.

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

15. The Ministers claimed that all of the information falling within scope was exempt from disclosure in terms of section 29(1)(a) of FOISA.
16. Under section 29(1)(a) of FOISA, information held by the Scottish Administration (which, in terms of section 126 of the Scotland Act 1998, includes the Ministers) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" 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 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 that existing policy.
17. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy.



18. The Ministers submitted that the information identified as relevant to this case was part of a policy process aimed at identifying a range of policy ideas and then implementing them. The Ministers argued that the fact that one of the options was not then taken to the implementation stage did not mean that the policy around these issues was now settled. The Ministers submitted that consideration of how best to serve learners in Scotland via educational structures and processes was ongoing, and they would not wish to release information that would potentially prejudice future considerations. The Ministers argued that this case relates to the development of policy regarding the organisation of the education system in Scotland, which is something the Scottish Government considers on an ongoing basis “as part of its duty to lead the education system”.
19. Having considered the withheld information and the Ministers' arguments, the Commissioner accepts that all of the withheld information comprises information which relates to the formulation of government policy and, therefore, that it falls within the scope of the exemption in section 29(1)(a) of FOISA.
20. The exemption in section 29(1)(a) is a qualified exemption, which means that it 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.

*Public interest test – submissions from the Ministers*

21. The Ministers acknowledged that there is a presumption in all cases that information should be released and that there is substantial public benefit in disclosing as much information as possible to encourage open government and to contribute to accountability. The Ministers submitted that they had given careful consideration to the argument that, in this case in particular, where the policy area in question is of substantial and ongoing public interest, releasing information could contribute to more informed debate and greater public understanding of the policy development and decision-making processes.
22. However, in balancing these arguments, the Ministers had also considered whether there were legitimate reasons for withholding the information. The Ministers submitted that, while they recognised the need for openness and transparency, there is also an important need for the Scottish Government to base its decisions on the best advice possible. Consequently, the Ministers argued that they need to be allowed room to consider all policy options and to consider the implications of advice without that information being disclosed prior to the decision being made, which could potentially undermine the commissioning and use of evidence in current and future policy development and provide a disincentive to consider the widest possible range of evidence and advice in future decision-making.



23. The Ministers argued that the Scottish Government must be able to consider a wide range of policy options (some of which may be controversial) before settling on a course of action, and that it must also be able to engage with key stakeholders at an early stage as policy is being developed. They considered that disclosure of the information in this case might pose a risk to future Ministerial decision-making, through, for example, pressure to reduce recording of evidence, discussions and policy development to the detriment of the public record. The Ministers submitted that disclosure of information in this case is likely to inhibit future considerations, as concerns about the subsequent release of information would impinge on a full analysis of options.
24. Additionally, the Ministers argued that disclosure of the information in this case would lead to key stakeholders being unlikely to engage early in the policy formulation process, as they would be wary of their early, informal views being released. Without the full consideration and the early involvement of key stakeholders to inform policy development, the Ministers submitted that the Scottish Government would not be able to satisfactorily discharge its duties to find ways to improve the education system. Ministers and officials should be able to undertake full assessments of any risks to policies posed by the prevailing circumstances without this information being disclosed prematurely before any necessary considerations or adjustments to policy are made.
25. The Ministers concluded that, on balance, the risks to good government, policy development and the potential effect on future policy development and decision-making combine in such a way that the public interest in this case lies in withholding the information.

*Public interest test – submissions from Mr Scott*

26. Mr Scott argued that it is in the public interest to know what options Ministers are considering when it comes to the proposed centralisation of education. Mr Scott commented that any proposed changes to the education system will affect children, parents, staff and the wider community at a local level. He noted that the current system allows for regional flexibility tailored to local needs and that the curriculum can be specific to the history, culture and facilities available in a local area. Mr Scott took the view that the education system should be centred on the school itself, and is best managed under local authority control.
27. Mr Scott noted that schools may not feel represented at meetings in a centralised location as the cost/time implications of attending such meetings may be prohibitive. Mr Scott also argued that centralisation will affect the way that sport community grounds are run; he submitted that many gateways have been opened up to local communities based on local interest (gymnasiums, sports fields, etc.) and that evening classes and adult education classes could also be affected by a move towards centralisation, as child and adult education may be controlled by different bodies.



28. Mr Scott argued that the voting public have a right to know what the government is proposing, as this may affect future voting decisions. Mr Scott submitted that school accountability is easier for parents to access and have addressed at a local level and that local authorities are best placed to meet face-to-face with local education stakeholders and to recognise and address their concerns. Mr Scott also argued that interlinking agencies which impact on children's education and wellbeing are better co-ordinated at a local level. A local authority is best placed to have an overview of all the educational, social, housing and other issues and circumstances which a family might be dealing with.

*Public interest test – the Commissioner's conclusion*

29. There is no doubt that the future development of the Scottish education system is a matter of significant public interest. As Mr Scott notes, the provision and delivery of education affects children, parents, staff and the wider community. It is not unreasonable to conclude that an effective education system is integral to a well-functioning society and that, consequently, the public interest in disclosing information about the development of the Scottish education system will be considerable.
30. The Ministers have acknowledged the argument that there should be an opportunity to see what options were or are being considered, put forward or discarded before decisions are taken, to allow public participation in decision making.
31. In weighing up the arguments against disclosure, the Commissioner notes that much of the withheld information relates to a very early stage of policy development, and records the views and contributions of stakeholders and officials. The Commissioner also notes that some of the withheld information takes forward suggested policy ideas to a more considered level, but she notes that the options discussed in these documents have not been implemented and that the development of education policy is ongoing.
32. The Commissioner recognises the public interest in ensuring that all options are explored and considered by the Ministers, which may require some private space to be afforded for a "brainstorming" period where ideas can be floated and an initial range of views gathered.
33. The Commissioner also accepts that it is important that stakeholders from outwith government are involved in policy development and discussion at an early stage, and she acknowledges that publication of the initial views of these stakeholders, in advance of any formal policy being put forward by the government, may well dissuade such stakeholders from participating in policy development in the future. The Commissioner considers that any action which would reduce or eliminate stakeholders' involvement in the process of government policy development would not be in the public interest.



34. The Commissioner considers Mr Scott's arguments on the public interest to be well-founded, but, on balance, given that the information he requested relates to such an early phase of policy development, she has concluded that there is a significant, and greater, public interest in Ministers being able to consider a range of options, some of which would be discarded or developed further in the later stages of policy development. For this reason, she accepts that there is a greater public interest in maintaining the exemption in section 29(1)(a) of FOISA than in disclosing the information covered by Mr Scott's request.
35. Having concluded that all of the information falling within the scope of Mr Scott's information request was exempt from disclosure under the terms of section 29(1)(a) of FOISA, the Commissioner is not required to consider any further exemptions in this case.

## **DECISION**

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

## **Appeal**

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Should either Mr Scott 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**  
**13 December 2012**



## 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 –

...

- (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;

...