

# Decision Notice



Decision 104/2013 Mr James Mackenzie and the Scottish Ministers

Religious organisations' views on same-sex marriage

Reference No: 201202357  
Decision Date: 3 June 2013

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## Summary

On 18 July 2012, Mr Mackenzie asked the Scottish Ministers (the Ministers) for information, excluding consultation responses, discussing the views of religious organisations on same-sex marriage.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the information as information relating to the formulation of Scottish 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)(b) (Effect of exemptions); 29(1)(a) and (4) (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 18 July 2012, Mr Mackenzie wrote to the Ministers requesting all information held, excluding consultation responses, “which discusses the views of religious organisations with regard to same-sex marriage”.
2. The Ministers responded on 2 October 2012. They provided Mr Mackenzie with details of the organisations the Ministers had met in connection with the consultation, with a summary of the wide variety of views recorded at these meetings.
3. On 3 October 2012, Mr Mackenzie wrote to the Ministers, requesting a review of their decision. Mr Mackenzie was not satisfied that he had been provided with all the information held by the Ministers and falling within the scope of his request.
4. The Ministers notified Mr Mackenzie of the outcome of their review on 31 October 2012. They acknowledged that their original response was incomplete. They provided some information, while informing Mr Mackenzie that the remainder was withheld under sections 29(1)(a), 30(b)(i) and 30(b)(ii) of FOISA.



5. On 14 November 2012, Mr Mackenzie wrote to the Commissioner's office, 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 Mackenzie 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

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7. On 28 November 2012, the Ministers were notified in writing that an application had been received from Mr Mackenzie and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the withheld information 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, with particular reference to those referred to in the review outcome.
9. During the investigation, the Ministers accepted that some of the information withheld was already in the public domain at the time of Mr Mackenzie's request. Publicly expressed views or statements contained in the withheld documentation withheld were released to Mr Mackenzie at that time.

## Commissioner's analysis and findings

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10. 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 Mackenzie and the Ministers. She is satisfied that no matter of relevance has been overlooked.
11. The Ministers applied sections 29(1)(a), 30(b)(i) and (ii) to all of information withheld.

### *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 translate into political action and/or legislation and when.
15. The Ministers applied section 29(1)(a) to all of the withheld information, which largely consists of briefing notes to Ministers, compiled to assist them in understanding the range of views offered on same-sex marriage. The Ministers stated that policy in this area continued to be developed, as shown by the consultation launched in December 2012 on the draft Marriage and Civil Partnership (Scotland) Bill.
16. The Ministers explained that the withheld information provided context with regard to how the policy was being developed prior to the Scottish Government deciding to take forward legislation in relation to same sex-marriage. In addition, subsequent to that decision being made, it provided context on how different aspects of the same-sex marriage policy could be developed to take account of concerns expressed by religious bodies.
17. The Ministers highlighted that this remained a live, active policy area, with legislation due to be introduced into Parliament in 2013. Consequently, they considered section 29(1)(a) an appropriate exemption to apply.
18. Mr Mackenzie made his request on 18 July 2012. The Scottish Government announced that it was proceeding with same-sex marriage on 25 July 2012<sup>2</sup>. At the time of the Ministers' submissions, the Commissioner acknowledges that the policy development process was ongoing. The Government launched a public consultation on the draft Marriage and Civil Partnership (Scotland) Bill on 12 December 2012.<sup>3</sup>
19. Having considered the withheld information, the Commissioner accepts that it is information which relates to the development of government policy and, therefore, that it falls within the scope of the exemption in section 29(1)(a) of FOISA. (As noted above, for information to fall under this exemption, it need only "relate" to the formulation or development of Government policy.)

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

<sup>2</sup> <http://www.scotland.gov.uk/News/Releases/2012/07/same-sex25072012>

<sup>3</sup> <http://www.scotland.gov.uk/Publications/2012/12/9433>



20. 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*

21. The Ministers recognised a public interest in ensuring transparency and accountability in the decision making of government. They also acknowledged the public, political and media interest in the development of policy arrangements with regard to same-sex marriage.
22. However, they considered the public interest in disclosure to be outweighed by the need for both Ministers and officials to have the space in which to fully discuss and develop policies. They considered that, if this information were to be released, officials would exercise an increased degree of caution in preparing information for inclusion in such papers/briefings in future. The Ministers argued that this would result in a qualitative change in the views expressed, the options offered, the recommendations made and the substance of the information contained in such papers. This could, they submitted, limit the range of options considered, rendering the legislative and policy making process less robust.
23. Additionally, 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 was developed than a more considered approach looking at a full range of options.
24. The Ministers highlighted that early or premature release might satisfy short-term public curiosity, but would not meet the longer term public interest in mature policy making.
25. The Ministers emphasised that, at the time of their submissions, this remained an ongoing area of policy, which was still evolving and had not yet been fully discussed, considered or implemented. Therefore, were this information to be released while it remained a “live” issue, there was an inherent danger that certain arguments might be taken out of context, open to misrepresentation or perceived misleading.
26. On balance, the Ministers considered that the public interest favoured maintaining the exemption.
27. In his application to the Commissioner, Mr Mackenzie expressed his concern that the exemption was widely misused to keep the public under-informed about policy-making processes. He considered the influence of external bodies on Ministerial decision-making to be a crucial issue of public concern.



28. Mr Mackenzie considered there to be a substantial public interest in ascertaining the extent of the influence brought to bear on this debate by external organisations. He felt that the need for the public to know about the content of these discussions clearly outweighs the general benefits of private policy-making and discussions.
29. The Commissioner has considered carefully the submissions made by both Mr Mackenzie and the Ministers, in light of the content of the withheld information and the context of this case.
30. The Commissioner agrees that there would be a significant public interest in disclosure of the information, as it would contribute to openness and accountability, and assist the public in understanding the full context in which policy decisions are made. Clearly, the subject matter of this application is one of considerable public concern.
31. The Commissioner notes that the information under consideration in this case is to be found largely in briefing documents to Ministers, containing summaries of the views and concerns expressed by religious organisations. She notes that the information sought by Mr Mackenzie expressly excludes those views expressed in the public consultation. The Commissioner has also considered the timing of Mr Mackenzie's request, which was made a matter of days prior to the public announcement that the government was proceeding with its policy relating to same-sex marriage: she acknowledges that the development of this policy is continuing.
32. The Commissioner has weighed the public interest, 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 Mackenzie's request, would have been likely to harm the policy-making process significantly. The Commissioner notes that these documents express views and concerns of religious organisations, which might not have been provided if there was a risk that they would be disclosed at this stage in the process.
33. The Commissioner concludes, in all the circumstances of this case, that the public interest in disclosure of the information under consideration is outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA. Consequently, the Ministers were entitled to withhold the information.
34. Having concluded that all the information falling within the scope of Mr Mackenzie's request was exempt from disclosure at the relevant time 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 Mackenzie.

## Appeal

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Should either Mr Mackenzie 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**  
**3 June 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 –

...

- (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

...



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