

Decision Notice

Decision 050/2016: Mr Tommy Kane and the Scottish Ministers

Information relating to a meeting with the Qatari Ambassador

Reference No: 201501721
Decision Date: 3 March 2016



Summary

On 15 June 2015, Mr Kane asked the Scottish Ministers (the Ministers) for information relating to a meeting with the Ambassador of Qatar.

The Ministers told Mr Kane they did not hold some of the information he had asked for and that the information they did hold was exempt from disclosure. Following a review, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had partially failed to respond to Mr Kane's request for information in accordance with Part 1 of FOISA. While the Ministers had correctly withheld information under section 30(c) and 32(1)(a)(i) of FOISA, they had wrongly withheld information which they later disclosed to Mr Kane.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs); 32(1)(a)(i) and (3) (definition of "State") (International relations)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 15 June 2015, Mr Kane made a request for information to the Ministers. The information requested was:
 - (i) A copy of any documentation relating to the meeting between the Minister for External Affairs and International Development, Humza Yousef MSP, and H.E. Khalid Rashid Al-Mansouri KCVO (Ambassador Extraordinary and Plenipotentiary of Qatar to the UK) which took place on the 5th December 2012, including any pre-meeting briefing, the agenda for the meeting, the minute or note taken from the meeting and any post-meeting briefing or report.
 - (ii) A copy of any correspondence between the Minister for External Affairs and International Development, Humza Yousef MSP and/or any Scottish Government Official with H.E. Khalid Rashid Al-Mansouri and/or any Qatari official in relation to, and covering any action points from, the meeting on the 5th December 2012, including emails, letters, phone text and any other communication.
2. The Ministers responded on 10 July 2015. They provided Mr Kane with some of the information covered by his request, but notified him that other information was not held, and that they were withholding information under section 32(1)(a)(i) of FOISA. The Ministers also noted that some information had been redacted from the documents provided to Mr Kane, as it did not fall within the scope of his request.
3. On 5 August 2015, Mr Kane wrote to the Ministers requesting a review of their decision on the basis that it was in the public interest for the people of Scotland to know what dealings

their government has had with Qatar. Mr Kane also asked the Ministers to review all of the redactions to ensure that the redacted information was not within the scope of his request.

4. The Ministers notified Mr Kane of the outcome of their review on 2 September 2015. The Ministers disclosed additional information to Mr Kane, but they withheld other information under sections 30(c) and 32(1)(a)(i) of FOISA. They also told Mr Kane they did not hold some information for the purposes of FOISA, as it was information provided to them in confidence by the UK Government (section 3(2)(a)(ii)). The Ministers confirmed that the information they had redacted was outwith the scope of his request.
5. On 21 September 2015, Mr Kane applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kane stated he was dissatisfied with the outcome of the Ministers' review because he wanted to be satisfied that the information redacted from the disclosed documents was outwith the scope of his request. Mr Kane also argued that it was in the public interest to disclose all information relating to Scotland's relationship with Qatar.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Kane made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 5 October 2015, the Ministers were notified in writing that Mr Kane had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Kane. The Ministers provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
9. During the investigation, the Ministers withdrew their reliance on section 3(2)(a)(ii) of FOISA. They also disclosed additional information to Mr Kane.

Commissioner's analysis and findings

10. 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 Kane and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Withheld information

11. The Ministers continued to withhold the following information from Mr Kane:
 - (i) text from documents 5 and 6, withheld under section 32(1)(a)(i) of FOISA;
 - (ii) text from document 7 under section 30(c) of FOISA; and
 - (iii) text from documents 1-4, which the Ministers consider to be outwith the scope of Mr Kane's request.

Out of scope redactions

12. The Ministers have redacted information from documents 1-4 on the basis that it is outwith the scope of Mr Kane's request. Mr Kane has asked the Commissioner to investigate this point and determine whether the information does or does not fall within the scope of his request.
13. The Commissioner notes that Mr Kane requested any information relating to the meeting of 5 December 2012 and any correspondence generated as a result of that meeting. The Commissioner has reviewed documents 1-4 and notes that the information redacted by the Ministers relates to other meetings attended by Humza Yousef MSP. The Commissioner has no difficulty in accepting that this information is outwith the scope of Mr Kane's request.

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

14. 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 (or would be likely to) be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
15. There is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice in question must be substantial and of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, and not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances. This may include the timing of the request.
16. The Ministers withheld two sentences from document 7 under section 30(c) of FOISA. The Ministers argued that the information is sensitive as it relates to the international operations of an external stakeholder and its partners and, specifically, to broad plans for future development which are still under discussion. The Ministers provided an email from the external stakeholder which explained why the redacted information was commercially confidential, and which asked for the information to be withheld.
17. The Ministers submitted that it is essential that officials are able to communicate with external stakeholders on a range of issues. The Ministers argued that disclosing the content of these communications, particularly without the consent of the stakeholder, is likely to undermine trust in the Scottish Government and will substantially inhibit communications on this type of issue in the future.
18. The Ministers asked the Commissioner to note the external stakeholder's statement that it would be reluctant to participate in meetings and provide views as fully and frankly if it believed that those views and future plans were likely to be made public, particularly while discussions in relation to developing potential partnerships are still ongoing. In turn, the Ministers argue that this would specifically harm the Scottish Government's ability to carry out many aspects of its work in relation to building relationships and promoting Scottish culture abroad. If it is not fully aware of the opportunities being explored, this could

adversely affect its ability to gather all of the information it needs to make fully formed decisions in relation to the support and promotion of stakeholder plans.

19. Having considered the nature and content of the withheld information, and the submissions provided by the Ministers, the Commissioner accepts that disclosing the information would be likely to cause substantial prejudice to the effective conduct of public affairs, given the need for open and productive discussions between the Government and external stakeholders when agreeing plans to promote Scottish culture.
20. The Commissioner notes the submissions from the external stakeholder and considers that these support the Ministers' views that disclosure of the withheld information would dissuade this particular stakeholder from sharing future plans with the Scottish Government. The Commissioner considers it likely that the refusal of one stakeholder to engage with the Scottish Government in these circumstances might lead other external stakeholders to adopt a more cautious approach in terms of the information they share with the Scottish Government.
21. The Commissioner therefore accepts that the Ministers were entitled to apply the exemption in section 30(c) of FOISA to the withheld information.
22. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Public interest test

The Ministers' submissions

23. The Ministers acknowledged that there was some public interest in the Scottish Government's discussions with other States; in this case, Qatar. The Ministers also recognised that there is a public interest in disclosing information as part of open, transparent and accountable government. The Ministers submitted they fully recognise the public interest in this issue, as demonstrated by their disclosure of some information that fell within the scope of Mr Kane's request.
24. The Ministers noted that Mr Kane's application to the Commissioner indicated that he is interested in the withheld information because of his interest in the Scottish Government's discussions with Qatar. The Ministers submitted that the withheld information did not relate to the Government's discussions with Qatar, but related to a third party stakeholder, and its disclosure was unlikely to assist Mr Kane.
25. The Ministers argued that there is a greater public interest in allowing Ministers and officials a private space within which to communicate with appropriate stakeholders as part of the process of exploring opportunities to develop cultural links abroad. The Ministers contented that this private space is essential to enable all options to be properly considered, so that good decisions can be taken based on discussions in confidence with key stakeholders. They argued that premature disclosure is likely to undermine the full and frank discussion of issues between the Scottish Government and stakeholders, who would be reluctant to share information in future. The Ministers maintained that this would undermine the decision making process, which would not be in the public interest.

Mr Kane's submissions

26. Mr Kane argued that the Scottish Government's dealings with Qatar are very much in the public interest and should be open, transparent and accountable to the people of Scotland. Mr Kane submitted that the Scottish Government's recent dealings with Qatar have provoked disquiet in some quarters in Scotland, and all Scottish Government documents which chronicle their recent meetings and dialogue should be open to public scrutiny.
27. Mr Kane argued that, from information he has received, it is clear that the Scottish Government has been involved in an operation to pitch for investment from Qatar in Scottish renewables and other sectors. Mr Kane argued that it was absolutely right that all the dealings the Scottish Government has with Qatar should be open and transparent to the wider public, particularly while trying to seek favour and investment.

The Commissioner's conclusions

28. The Commissioner accepts there is a general public interest in transparency and accountability, particularly when the Scottish Government is engaged in discussions with other sovereign states. When the Scottish Government meets with representatives of other states, it is essentially representing the people of Scotland, and as such there is an expectation of openness and transparency, particularly where meetings concern discussions about finance or public spending which could have an impact on the people of Scotland.
29. However, the Commissioner notes that the information being withheld under section 30(c) of FOISA is listed under the heading "culture" and comprises information provided to the Scottish Government by an external organisation (the stakeholder).
30. Having read the email from the external stakeholder, the Commissioner accepts that the stakeholder considers the withheld information to be commercially sensitive and linked to provisional plans which were very much ongoing and in no way complete or finalised. The Commissioner is satisfied that the stakeholder had no expectation that the Scottish Government would disclose its plans publicly. She has already accepted that disclosure would inhibit the stakeholder from providing the Scottish Government with full information about its future plans.
31. The Commissioner has taken account of Mr Kane's public interest arguments, but finds that they are not compelling, in relation to the contents of the information withheld under section 30(c) of FOISA.
32. On balance, having taken account of all the submissions before her, the Commissioner is of the view that the public interest in withholding the information (and so protecting the flow of information to the Scottish Government from external stakeholders) outweighs the public interest in disclosing it.
33. The Commissioner therefore finds that the Ministers were entitled to withhold information from document 7 under section 30(c) of FOISA.

Section 32(1)(a)(i) – Substantial prejudice to international relations

34. The Ministers have relied on the exemption in section 32(1)(a)(i) of FOISA to withhold information contained in two documents. Section 32(1)(a)(i) states that information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially relations between the United Kingdom and any other State. ("State" is defined in section 32(3) of FOISA – see Appendix 1.)

35. The Ministers withheld information from documents 5 and 6 under this exemption. Document 5 is a summary of a private “government to government” meeting. The Ministers said that there would be no expectation that details of a private meeting, prepared for purely internal circulation, would be made public. Document 6 is a letter sent after this meeting.
36. For the exemption in section 32(1)(a)(i) to apply, the harm caused, or likely to be caused, by disclosure requires to be at the level of substantial prejudice: it must be of real and demonstrable significance. For the substantial prejudice to be "likely", the Commissioner takes the view that there must be a significant probability that it will occur, in the near (certainly the foreseeable) future.
37. In her briefing on section 32¹, the Commissioner emphasises that authorities applying this exemption must justify doing so on a case by case basis. Authorities should be aware that the international relations of the whole of the United Kingdom must be engaged for the exemption to apply, and should consider the potential impact of disclosure on the United Kingdom's particular relationship with the State in question rather than looking solely at the nature, content and/or sensitivity of the information. The other State's attitude to freedom of information may be relevant.
38. The Commissioner's briefing states that if a negative reaction is anticipated from the disclosure of information, an assessment will have to be made as to whether this reaction would, or would be likely to, prejudice the relationship in question substantially. There may be circumstances where the disclosure of information may cause diplomatic annoyance or irritation, but would not necessarily result in significant, long term harm to relations with the State in question. The timing of disclosure may also be an issue, and the risk of substantial prejudice may well diminish as time passes.
39. The Ministers noted that they have disclosed additional information from both documents 5 and 6 to Mr Kane and the only information now being withheld relates to particular topics on which the Ambassador was seeking specific advice. The Ministers argued that these topics remain sensitive, and they consider that disclosure would be likely to prejudice substantially relations between the United Kingdom and Qatar, given that this remains a sensitive time for relations. The Ministers provided an email from the Qatari Embassy which indicated a preference for withholding the requested information. The Ministers consider that this suggests that disclosure of the withheld information would inhibit Qatar's willingness to have discussions with the Scottish Government or the UK Government on sensitive topics in future, as it would be concerned that such information would be disclosed.
40. The meeting took place between the Ambassador Extraordinary and Plenipotentiary of Qatar to the UK and the Scottish Government's Minister for External Affairs and International Development. However, the Ministers argued that as foreign relations are reserved to the UK Government, they consider that UK interests were as directly involved as any distinctly Scottish interests; in fact, they considered them to be inextricably linked. The Ministers submitted that, given the established convention that such diplomatic communications are made in terms of inferred or assumed confidentiality, the release of related communications (such as a summary of the meeting) would substantially prejudice UK relations with the administration of Qatar.
41. The Ministers further argued that as well as potentially prejudicing the prospect of further open dialogue with the administration of Qatar, disclosure could also lead other foreign

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section32/Section32.aspx>

governments to consider the nature and substance of their contact with the Scottish Government if they believed it likely that information they would reasonably expect to have been exchanged on a confidential basis would subsequently be released. The Ministers submitted that disclosure would substantially prejudice UK interests internationally if it was seen that material relating to private meetings was likely to be released.

42. The Ministers argued that disclosure could have far-reaching consequences for their ability to maintain and build relationships with other governments, and would indirectly impact on the promotion of important trade, cultural and educational opportunities for Scotland.
43. The Commissioner has considered the withheld information in documents 5 and 6 along with the Ministers' submissions, and she accepts that disclosure of this information would, or would be likely to, have a substantially prejudicial impact on relations between the United Kingdom and the administration of Qatar. The Commissioner recognises that while the information relates to a meeting between a Scottish MSP and the Qatari Ambassador, foreign relations are a reserved matter for the United Kingdom Government. She accepts that disclosure of sensitive information exchanged during a meeting could not only harm relations between Scotland and Qatar, but is likely to harm relations between the UK and Qatar.
44. The Commissioner is satisfied that the withheld information was created with an expectation of confidentiality and she has taken account of the email from the Qatari Embassy that expresses concern about disclosure. The Commissioner also notes the Ministers' comments that UK interests would be harmed internationally if it was seen that material relating to private meetings with foreign dignitaries was likely to be released. The Commissioner recognises that there is no equivalent of FOISA in Qatar and the expectations of Qatari officials regarding the confidentiality of private meetings are likely to be higher than those of UK officials.
45. The Commissioner accepts that the withheld information is sensitive, in terms of its content, and she considers that its disclosure could cause significant harm to the working of the relevant diplomatic conventions or the relationship between the United Kingdom and Qatar.
46. For the reasons given above, therefore, the Commissioner accepts that disclosure of the withheld information would, or would be likely to, prejudice substantially relations between the United Kingdom and Qatar, and that the Ministers were entitled to apply the exemption in section 32(1)(a)(i) of FOISA to information withheld from documents 5 and 6.
47. The exemption in section 32(1)(a)(i) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must therefore go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

Public interest test

Ministers' submissions

48. The Ministers acknowledged that there is some public interest in disclosure of information about the Scottish Government's discussions with other States, such as Qatar. The Ministers also recognised that there is a public interest in disclosing information as part of open, transparent and accountable government.
49. However, the Ministers argued that there is a greater public interest in ensuring the UK Government is able to maintain good relations with other States, in order to protect and

promote UK interests abroad. The Ministers submitted that there can be no public interest in jeopardising those relations by the Scottish Government disclosing information which was shared in confidence. The Ministers maintained that the public interest lies in maintaining good relations, based on trust and respect, between the UK and Qatar, especially given the opportunities for expanding trade and cultural links between both nations.

50. The Ministers argued that there is a vital public interest in allowing Scottish Ministers and officials a private space within which to engage in full and frank discussions with their counterparts in other States. Such discussion makes for better quality and better informed policies and decision on issues with an international dimension and aids the protection and promotion of UK interests abroad. The Ministers submitted that inappropriate disclosure is likely to damage other States' confidence and trust in the UK and thus undermine discussions and international relations more generally. The Ministers maintained that there was no public interest in disclosing information which might damage UK interests.

Mr Kane's submissions

51. Mr Kane has referred to concerns that other bodies or individuals have raised about Qatar, with specific reference to its record on human rights, particularly in relation to the treatment of women and migrant workers. Mr Kane noted that it is against this backdrop that public disquiet has been raised over Scotland's current relations with Qatar. He argued that all dealings must be open and transparent, and that is in the public interest for the people of Scotland to know what dealings their government has had with Qatar.
52. Mr Kane has argued that disclosure of this information would not constitute any type of security risk: the only risk would be to the reputation of the Scottish Government and, on balance, he considers that the public interest would be better served by full disclosure. Mr Kane argued that full disclosure would allow the Scottish public to judge the activities of the Scottish Government on its own merits. Given its activities with Qatar, and the record of the Qatari Government, he considered that the Scottish people have the right to make their own judgement with all the facts at their disposal.

Commissioner's conclusions

53. The Commissioner accepts there is a general public interest in transparency and accountability, particularly when the Scottish Government is engaged in discussions with other sovereign states. The Commissioner does not consider that this public interest is strengthened or weakened depending on the sovereign state involved. But, she acknowledges the concerns raised by Mr Kane about the record of the Qatari Government in relation to human rights, and accepts that there is a public interest in letting the Scottish people know what involvement the Scottish Government has had with Qatari representatives.
54. The Commissioner notes that the Ministers have disclosed most of the content of documents 5 and 6 and have only withheld information which is considered particularly sensitive. The Commissioner considers that, to a large extent, the Ministers have addressed the public interest in transparency and openness by disclosing this information to Mr Kane (and the wider public). The Commissioner notes that the redactions are very much focused on protecting information that would, or would be likely to, harm international relations between Qatar and the UK.
55. The Commissioner has already found that disclosure of the information would, or would be likely to, prejudice substantially relations between the UK and Qatar. Therefore, in order for the Commissioner to disclose information in this case, she must conclude that the public

interest in disclosure outweighs the substantial prejudice to international relations that would follow disclosure. Having considered the withheld information, the Commissioner considers that the public interest in disclosure is outweighed by the public interest in maintaining international relations between the UK and Qatar. The Commissioner therefore finds that the information was correctly withheld under section 32(1)(a)(i) of FOISA.

Decision

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

The Commissioner finds that by correctly withholding information under section 30(c) and 32(1)(a)(i) of FOISA, the Ministers complied with Part 1.

However, by initially withholding information that was later disclosed to Mr Kane, the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner does not require the Ministers to take any action in respect of this failure in response to Mr Kane's application.

Appeal

Should either Mr Kane or the Scottish Ministers wish to appeal against this decision, they have the right to 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 March 2016

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.

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.

32 International relations

- (1) Information is exempt information if-

- (a) its disclosure under this Act would, or would be likely to, prejudice substantially-
- (i) relations between the United Kingdom and any other State;

...

- (3) In subsection (1)-

...

"State" includes-

- (a) the government of any State; and
- (b) any organ of such a government,

and references to a State other than the United Kingdom include references to any territory outwith the United Kingdom.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info