

Decision Notice

Decision 163/2017: Mr A and the Scottish Ministers

Feasibility study – Carer’s Allowance

Reference No: 201700747

Decision Date: 3 October 2017



Scottish Information
Commissioner

Summary

The Ministers were asked about a feasibility study on the Carer's Allowance, carried out by the Department of Work and Pensions (DWP). The Ministers stated that the information was held in confidence, having been provided by the UK Government, and so was not held by them for the purposes of FOISA.

The Commissioner investigated and was satisfied that some of the information requested was not held by the Ministers, as they had claimed.

The Commissioner also found that the Ministers did hold some information in their own right, but that it was exempt as its disclosure would cause substantial prejudice to relations between the Ministers and the UK Government.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 3(2)(a)(ii) (Scottish public authorities); 17(1) (Notice that information is not held); 28 (Relations within the United Kingdom)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 10 February 2017, Mr A made a request for information to the Scottish Ministers (the Ministers). Mr A referred to the minutes of a meeting of the Joint Ministerial Working Group on Welfare, which took place in London on 11 October 2016¹, and which made reference to a feasibility study relating to the Carer's Allowance. Mr A requested:

the feasibility study to see if the DWP can deliver an increased Carer's payment on behalf of Scottish Government ... provided to the Scottish Government from the Department of Work and Pensions of UK Government and its Ministers or staff.

This should include any formal reports from the DWP, as well as any informal observations/advice provided and meeting notes where delivery of the carers allowance has been discussed.

2. The Ministers responded on 13 March 2017. They informed Mr A that they considered the information to be exempt from disclosure under section 29(1)(a) of FOISA, as it related to the

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http://www.parliament.scot/S5_Social_Security/General%20Documents/Cab_Sec_CSSE_to_Convener_Social_Security_-_JMWGW_-_3_Nov_-_minutes_of_11_Oct_2016_mtg.pdf,

formulation of Scottish Government policy. Having considered the public interest, they concluded that it should be withheld.

3. Later that day, Mr A wrote to the Ministers, requesting a review of their decision. He argued that the public interest test had not been satisfied. He suggested that the policy in question was at the stage of implementation, to which section 29(1) would not apply, rather than development.
4. The Ministers notified Mr A of the outcome of their review on 21 April 2017. The Ministers informed Mr A that they now considered section 3(2)(a)(ii) of FOISA to be applicable: the information had been received in confidence from the UK Government and therefore, in their view, the Ministers did not hold the information for the purposes of FOISA. The Ministers suggested that Mr A might wish to submit a request to the DWP for the information he was seeking.
5. On 21 April 2017, Mr A wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr A stated he was dissatisfied with the outcome of the Ministers' review because he was not satisfied that they had met their duties in relation to his request.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 30 May 2017, the Ministers were notified in writing that Mr A had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr A. 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, focusing initially on the application of section 3(2)(a)(ii) of FOISA.
9. The Ministers responded with submissions to the effect that they did not hold the information for the purposes of FOISA, in support of their application of section 3(2)(a)(ii). If this was not accepted by the Commissioner, the Ministers submitted that they wished to rely upon the exemptions in sections 28(1) and 29(1) of FOISA.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered the information provided to her along with all of the relevant submissions, or parts of submissions, made to her by both Mr A and the Ministers. She is satisfied that no matter of relevance has been overlooked.
11. The Ministers provided the Commissioner with a total of 20 documents, some with attachments. Having considered the information, the Commissioner accepts that all of the information, with the exception of document 19, fell within the scope of Mr A's request. Document 4 related to a minute of a meeting, which is already within the public domain. As such, documents 4 and 19 will not be considered in this decision.

12. The Ministers submitted that they did not consider that any of the information was held by them for the purposes of FOISA, as this information fell to be considered under section 3(2)(a)(ii) of FOISA. To support this, the Ministers wished to rely upon section 28(1) of FOISA and section 29(1) of FOISA for some of the information.
13. The Commissioner will first of all consider whether the information requested by Mr A is held by the Ministers for the purposes of FOISA. Only if the Commissioner considers that the Ministers do hold information for the purposes of FOISA will she go on to consider the application of the exemptions in section 28(1) and 29(1) of FOISA.

Information held by the Ministers

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it.
15. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

Section 3(2)(a)(ii) (Information supplied by the UK Government)

16. In terms of section 3(2)(a)(ii) of FOISA, information which is held in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom, is not considered to be held by a Scottish public authority for the purposes of FOISA.
17. The purpose of section 3(2)(a)(ii) is to allow UK Ministers and Government departments to provide confidential information to Scottish public authorities whilst ensuring that any decision to release the information remains with the relevant UK Ministers and Government departments, and subject to the (UK) Freedom of Information Act 2000 rather than FOISA. This purpose was noted in the Policy Memorandum which accompanied the Freedom of Information (Scotland) Bill and also in the Justice 1 Committee debates.
18. The Commissioner is satisfied that the DWP is a department of the Government of the UK.
19. The Commissioner's briefing on the exemption in section 28 of FOISA² states that there are three points to consider when determining whether section 3(2)(a)(ii) of FOISA applies. These are:
 - (i) **was the information provided in circumstances giving rise to (or at least implying) a specific obligation to keep it confidential?** In most cases, there should be a clear indication that information was intended to be treated as confidential, for example with a protective marking (e.g. "restricted", "secret" or "top secret") or some other express statement.
 - (ii) **is the information still confidential at the time of the request?** This will depend on the nature of the information. In order to be confidential, it needs to have a necessary quality of confidence – the information must not be common knowledge or otherwise publicly available. For example, a document supplied to a public authority may subsequently have been published, in which case it is no longer confidential.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section28/Section28.aspx>

(iii) **would any damage result from the disclosure of the information?** In general, if no damage would follow from disclosure, there is no need to keep information confidential.

20. While the Commissioner notes that only some of the information was protectively marked as “Official – Sensitive”, the Ministers explained that the exchanges between the Ministers and the DWP were subject to a Memorandum of Understanding³ (MOU) between the Ministers and the DWP on joint working arrangements, covering the implementation of devolved provisions in the Scotland Act 2016 relating to Social Security and Employment Support Services in Scotland.

21. In their submissions to the Commissioner, the Ministers drew attention to section 10.16.1 of the MOU, which states:

SG and DWP are subject to the Official Secrets Act 1989, the DPA 1998 and Human Rights Act 1998 with regard to information each party receives from each other. Information supplied by DWP to SG that is to be held in confidence under the terms of this MOU will be exempt from disclosure under the Freedom of Information (Scotland) Act 2002, by virtue of section 3(2)(a)(ii) of that Act. Information supplied by SG to DWP will not be subject to a similar exemption from the Freedom of Information Act 2000.

22. In section 10.16.3, the MOU also states:

SG will treat all information passed to it by DWP that is not already in the public domain as “Official – Sensitive” and will restrict access to the same to those with a genuine business need within the SG. SG will not forward the information to third parties or put it into the public domain (directly or indirectly) without the prior agreement of the DWP SPoC [Single Point of Contact].

23. The Ministers also submitted, and evidenced, that the DWP considered the information provided had been provided to the Ministers in confidence and that the information should either be considered to be not held under section 3(2)(a)(ii) or, if held, exempt in terms of section 28(1) of FOISA.

24. The Ministers further submitted that the information remained confidential as this remained an area of policy development and the Ministers and the DWP were exploring how to take this work forward as part of the Social Security Bill introduced to Parliament on 20 June 2017. The Ministers confirmed that the policies remained in the development stages and that they were endeavouring to seek the best advice and assistance they could to support the Scottish Government in taking forward this new strand of responsibility, only recently devolved.

25. Regarding damage as a result of disclosure, the Ministers stated that disclosure of documentation provided by DWP and correspondence between the Ministers, the DWP and the Scotland Office would substantially prejudice the Ministers’ relationship with the DWP. They stated that the programme to devolve social security powers was at an early and extremely sensitive stage and it had taken a considerable amount of time, and effort, to establish the necessary relationship of trust between UK civil servants and Ministers.

26. The Ministers argued that losing or damaging this trust would have a direct and adverse impact on the programme, prejudicing substantially their ability to develop the programme

³ <https://beta.gov.scot/publications/social-security-and-employment-support-services-mou/MoU%20Scottish%20Government%20and%20DWP%20October%202016%20unsigned%20version.pdf?inline=true>

and most likely lengthening the timescales for delivery. This, in turn, would have an impact on the quality and content of information flowing between civil servants, affecting the working relationships between Ministers in the UK and Scottish Governments.

27. The Ministers highlighted the importance of their ability to engage with the DWP on this work, to understand the necessary processes and workstreams to deliver these powers in Scotland. The Ministers identified the need to maintain an open and closely collaborative relationship for this purpose, to benefit from the DWP's background and detail in developing a considered and feasible plan with regard to establishing the Carer's Allowance Supplement for Scotland. This made it vital for lines of communication to remain clear and uninhibited, with no disincentive to either party discussing issues and identifying a suitable way to deliver the social security programme. Disclosure, they argued, would substantially prejudice the likelihood of such collaboration and, as a result, inhibit the programme's delivery in Scotland.
28. Taking account of the MOU, the information provided to the Commissioner and the submissions by the Ministers, the Commissioner is satisfied that the information within documents 1-3, 6-9, 11, 12, 13 (part), 14-17, 18 (part) and 20 was provided in confidence to the Ministers and is held under circumstances bringing it within section 3(2)(a)(ii) of FOISA. The Commissioner is satisfied that the conditions set out at paragraph 19 above are met for the information in these documents.
29. As such, the Commissioner has concluded that the information contained within those documents was (and is) not held by the Ministers for the purposes of FOISA and the Ministers were not obliged to provide them following a request under section 1(1).
30. The Commissioner does not, however, accept that the same can be said for the information in documents 5, 10, 13 (part) and 18 (part), as the information therein must be considered to have emanated from the Ministers rather than the DWP. Documents 13 and 18 comprise email exchanges between Scottish Government officials and those of the DWP, and the Commissioner cannot accept that the Scottish Government "side" of these exchanges contains material obtained from the DWP. As such, the Commissioner finds that this information is held by the Ministers for the purposes of FOISA and, consequently, the Ministers held (and hold) information falling within the scope of Mr A's request.
31. In all the circumstances, therefore, the Commissioner does not accept that the Ministers were entitled to notify Mr A that they did not hold any relevant information, and so were not entitled to issue a response to this effect. In doing so, the Ministers breached Part 1 of FOISA. The Commissioner would urge Scottish public authorities to consider exchanges with the United Kingdom Government carefully, to ensure that section 3(2)(a)(ii) is claimed for relevant information only.
32. The Commissioner will now consider whether the information held by the Ministers for the purposes of FOISA can properly be withheld in terms of section 28(1) and/or section 29(1) of FOISA.

Section 28(1) (Relations within the United Kingdom)

33. Section 28(1) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The Scottish Administration and the Government of the United Kingdom both fall within the definition of "administration in the United Kingdom" in section 28(2) of FOISA. 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

relations between administrations by disclosure 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.

34. For section 28(1) to apply, the harm resulting from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption an authority must be able to satisfy her that the damage caused, or likely to be caused, by disclosing the information would be both real and significant, as opposed to hypothetical or marginal. For the harm to be likely, there would require to be at least a significant probability of it occurring, in the near or foreseeable future and not at some distant time.
35. The arguments presented by the Ministers for applying this exemption are basically those contained in paragraph 25 to 27 above, in other words that disclosure would place in jeopardy vital lines of communications between the Ministers and the UK Government.
36. The Ministers submitted that they considered it necessary to be able to work in partnership with the DWP to develop this programme of work, and disclosure of the information would substantially prejudice their ability to continue to engage and learn and make use of the advice and assistance being provided by the DWP, who had the knowledge and experience of running a social security programme required in order to effect a successful transfer of powers and responsibilities.
37. The Ministers explained that social security was a new area of work for them, including potentially sensitive and highly contentious issues which would change and develop throughout the policy development process. They submitted that disclosure of this information at this early stage of development would jeopardise and substantially prejudice their ability to support the ongoing open and collaborative working relationship with the DWP on an ongoing piece of work that they considered central to the success of developing Scottish Government policy on Social Security.
38. The Commissioner has considered the submissions made regarding this exemption and the information held. Given the circumstances in which the information was exchanged, the Commissioner is satisfied that its disclosure would, or would be likely to, prejudice substantially the relationship between the Ministers and the UK Government, specifically the DWP. In this instance, the Commissioner is especially persuaded by the Ministers' arguments regarding the need to ensure that the administrations of the United Kingdom have an open and collaborative working relationship in a key policy area which is in the process of being devolved.
39. Having considered the information held by the Ministers and the submissions received, the Commissioner is satisfied that disclosure of the information would, or would be likely to, prejudice substantially relations between the Ministers and the UK Government.
40. In all the circumstances, the Commissioner accepts that the Ministers were correct to apply the exemption in section 28(1) of FOISA to the information held by them.

Public Interest test – section 28(1)

41. As mentioned above, the exemption in section 28(1) 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.

42. The Ministers recognised that there was undoubtedly a degree of public interest in disclosure of the withheld information, especially as it related to the development of social security policy and delivery in Scotland. They accepted that disclosure would promote openness and inform public debate. They noted, however, that they had published information on their plans for social security powers within Scotland, and would continue to do so as the plans developed.
43. The Ministers went on to emphasise that they were at the early stages of developing their capability to undertake responsibility for the provision of aspects of social security previously reserved to the UK Government. They submitted that disclosure of the information at this stage, without context or understanding of the potential issues and discussions with the DWP on building capability, would not be in the public interest.
44. The Ministers considered there to be a much stronger public interest in ensuring they were able to seek advice and assistance from the DWP, who had (as discussed above) the requisite experience and knowledge, and to be able to maintain a relationship with them with a view to the Scottish Government developing robust policies and building its own unique systems. They reiterated that this required the ability to exchange information in a private space, where the range of relevant issues and questions could be fully considered.
45. In his requirement for review, as referred to in his application to the Commissioner, Mr A stated that the general public discussion and interest in the feasibility study showed that disclosure of the information requested was in the public interest.

Commissioner's conclusions

46. The Commissioner has considered all of the submissions and accepts that, where the subject of the information is a matter which invokes public discussion and debate, there is a public interest in ensuring that such matters are open to scrutiny. She also acknowledges the general public interest in transparency and accountability, particularly where this might contribute to understanding how the Ministers interact with the UK Government as they prepare to provide services previously provided by the UK Government. She acknowledges that the withheld information might cast some light on these matters.
47. The Commissioner has also taken account of the submissions made by the Ministers on the public interest in maintaining the exemption. She has already acknowledged the risk of substantial prejudice to the relationship between the Ministers and the UK Government in this case, with particular reference to the need to ensure that the administrations of the United Kingdom have an open and collaborative working relationship. She accepts that such harm would not be in the public interest.
48. The Commissioner accepts that it is important for the Ministers maintain a good relationship with the UK Government and other administrations, to facilitate the effective consideration and development of policy in this area. It is important that devolved administrations can represent their interests freely to the UK Government and, equally, that the UK Government is not inhibited in sharing its experience in key areas, where this would be useful. The Commissioner appreciates that this will, from time to time, involve the exchange of information and views of a confidential and sensitive nature.
49. Taking all of the circumstances into consideration, on balance, the Commissioner accepts that greater weight should be attached to the arguments which would favour withholding this particular information and maintaining the exemption. The public interest in disclosure might be greater in other cases, but the Commissioner must consider the information and the

circumstances in each individual case. Having reached this conclusion, the Commissioner finds that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 28(1) of FOISA. Therefore, the Ministers were entitled to withhold the information held under that exemption.

50. Given that the Commissioner is satisfied that the information held by the Ministers was properly withheld in terms of section 28(1) of FOISA, she is not required to, and will not, go on to consider whether the exemption in section 29(1) of FOISA could also apply.

Decision

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

The Commissioner found that while some of the information requested was not held by the Ministers, being subject to section 3(2)(a)(ii) of FOISA, the Ministers were not entitled to claim this in relation to other information, and in doing so failed to comply with section 1(1) of FOISA.

However, the Commissioner finds that the information held by the Ministers could be withheld under section 28(1) of FOISA.

Appeal

Should either Mr A 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.

Margaret Keyse
Acting Scottish Information Commissioner

3 October 2017

Appendix 1: 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.
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...
- (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.
- ...

3 Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
- (a) by the authority otherwise than-
- ...
- (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or
- ...

17 Notice that information is not held

- (1) Where-
- (a) a Scottish public authority receives a request which would require it either-
- (i) to comply with section 1(1); or

- (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

- (b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

...

28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.
- (2) In subsection (1), "administration in the United Kingdom" means-
 - (a) the Government of the United Kingdom;
 - (b) the Scottish Administration;
 - (c) the Executive Committee of the Northern Ireland Assembly; or
 - (d) the National Assembly for Wales.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info