

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2019

Public Authority: The Scotland Office
Address: Dover House
Whitehall
London
SW1A 2AU

Decision (including any steps ordered)

The complainant submitted a request to the Scotland Office seeking copies of communications it exchanged with HM Treasury, along with notes of any meetings between the two departments, about the confidence and supply arrangement with the DUP which the government agreed in June 2017. The Scotland Office confirmed that it held information falling within the scope of the request but sought to withhold this on the basis of sections 28(1) (relations within the UK), 35(1)(a) (formulation and development of government policy) and 35(1)(b) (Ministerial communications) of FOIA. The Commissioner has concluded that the information is exempt from disclosure on the basis of sections 35(1)(a) and 28(1) of FOIA and that in all the circumstances of the case the public interest favours maintaining each exemption.

Request and response

1. The complainant submitted the following request to the Scotland Office on 30 July 2017:
 - *Any communication between the Scotland Office and the Treasury between 6 June and 27 June (inclusive) on the funding implications of the confidence and supply arrangement with the DUP; any requests for extra funding for Scotland in this period; any direct contact between the Secretary of State for Scotland and the Chancellor and/or their*

officials in relation to the Barnett formula and/or extra funding for Scotland

- *Any communication between the Scotland Office and Downing Street between 6 June and 27 June on the funding implications of the confidence and supply arrangement with the DUP; any requests for extra funding for Scotland in this period; any direct contact between the Secretary of State for Scotland and the Chancellor in relation to the Barnett formula and/or extra funding for Scotland*
 - *Minutes of any meetings between the Scotland Office and the Treasury and/or Downing Street of the issue of funding for Scotland in relation to the confidence and supply deal with the DUP¹*
2. The Scotland Office responded on 28 July 2017 and refused to confirm or deny whether it held any information falling within the scope of the request on the basis of the following sections of FOIA: section 28(2), by virtue of section 28(1) (relations within the UK), and section 35(3) by virtue of sections 35(1)(a) (formulation and development of government policy) and 35(1)(b) (Ministerial communications). This position was upheld at the internal review stage.
 3. The complainant subsequently complained to the Commissioner and she issued a decision notice on 25 April 2018 (reference FS50709804) which found that section 28(2) was not engaged and that although section 35(3) was engaged, the public interest favoured confirming or denying whether the information was held.²
 4. The Scotland Office contacted the complainant on 30 May 2018 and complied with the decision notice by confirming that it did hold information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of sections 28(1), 35(1)(a) and 35(1)(b) of FOIA and the public interest favoured maintaining these exemptions.

¹ Further details about the agreement are available here:

<https://www.gov.uk/government/publications/conservative-and-dup-agreement-and-uk-government-financial-support-for-northern-ireland/agreement-between-the-conservative-and-unionist-party-and-the-democratic-unionist-party-on-support-for-the-government-in-parliament>

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2018/2258794/fs50709804.pdf>

5. The complainant replied on the same day and requested the information again in the following terms:

'Can you now provide me with the relevant correspondence and documents, in line with my original request and for the reasons provided in previous letters.'

6. The Scotland Office responded to this second request on 28 June 2018 and confirmed that the requested information was exempt from disclosure on the basis of sections 28(1), 35(1)(a) and 35(1)(b) and that the public interest favoured maintaining these exemptions.
7. The complainant contacted the Scotland Office on 21 July 2018 and asked it to conduct an internal review of this decision.
8. The Scotland Office informed him of the outcome of the review on 20 August 2018. It upheld the decision to withhold the requested information on the basis of the exemptions cited in the response of 28 June 2018.

Scope of the case

9. The complainant contacted the Commissioner on 16 October 2018 in order to complain about the Scotland Office's decision to withhold the information falling within the scope of his request dated 30 May 2018.

Reasons for decision

Section 35 – formulation and development of government policy

10. The Scotland Office sought to withhold the majority of the requested information on the basis of section 35(1)(a) of FOIA. This states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

11. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

12. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
13. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
14. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
15. The Scotland Office argued that the funding implications of the confidence and supply agreement with the DUP clearly related to the formulation and development of government policy. Furthermore, it argued that the majority of the withheld information related to the formulation and development of this policy. Having considered the information in question the Commissioner is satisfied that it clearly falls within the scope of section 35(1)(a) for the reasons set out by the Scotland Office.
16. Section 35(1)(a) is therefore engaged.

Public interest test

17. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of disclosing information

18. The complainant argued that there was a compelling public interest in disclosure of information falling within the scope of his request. More specifically, he made the following points:

- Economic; there has been significant discussion about the money involved in this deal and he argued that it would inform public debate if the requested information was released.
 - Constitutional; given questions over the future relationship between Scotland and the rest of the UK, he argued that the requested information would play an important role in informing the public about discussion in the UK government and the role the Scotland Office plays.
 - Political; given the Secretary of State for Scotland's media interviews on the subject on BBC outlets and newspapers, he argued that it is clearly in the public interest that any evidence relating to the issue is published.
 - Accountability; given questions over what role the Secretary of State for Scotland played in trying to secure further funding, he argued that the public has an interest in knowing what conversations took place.
19. The complainant also argued that there are significant questions over how decisions are made to allocate funds out with the Barnett process and it is therefore in the public interest for any communication on this to be available to the public.

Public interest arguments in favour of maintaining the exemption

20. In its internal review response the Scotland Office argued that there was a strong public interest in policy-making and its implementation being of the highest quality and informed by a full consideration of all the options. It explained that Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications. The Scotland Office argued that the candour of all involved would be affected by their assessment of whether the content of the discussions will be disclosed prematurely. If discussions were routinely made public, there is a risk that Ministers may feel inhibited from being frank and candid with one another.
21. With regard to the timing of the request, the Commissioner asked the Scotland Office whether, at the time of complainant's request of 30 May 2018, it considered the formulation and development of this policy to be ongoing, or already complete.

22. In response the Scotland Office noted that the Commissioner's guidance on this point acknowledges that it is not always easy to identify exactly when a policy is finalised so that formulation ends and implementation begins, and this will depend on the facts of each case.³
23. The Scotland Office explained that the confidence and supply agreement is expected to be in place for the length of this Parliament. However, the Scotland Office explained that current political events continue to call the certain future of the agreement in to question. As a result the Scotland Office argued that the policy making in respect of the funding implications that follow from that agreement continue to be a matter of policy formulation rather than implementation. The Scotland Office also emphasised that such discussions involve ministerial level decision making on a particularly high profile and politically sensitive nature. Consequently, the Scotland Office argued that particularly significant weight should be placed on maintaining the exemption given that this is a live matter and the disclosure of the information would constitute a significant breach of the safe space UK Ministers need to debate ongoing policy making issues, and also have a significant chilling effect on the free and frank discussions on which good UK Ministerial decision making depends.
24. The Scotland Office also argued that the extent to which the release of the specific information would inform the public interests identified by the complainant was very limited, when taking into account the policy positions publicly set out by the UK Government and Scottish government.

Balance of the public interest test

25. The Commissioner has initially considered the weight that should be attributed to the arguments in favour of maintaining the exemption.
26. With regard to the former, the Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case, at the point that the complainant made his request of 30 May 2018 the Commissioner acknowledges that the confidence and supply agreement

³ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf> see paragraphs 43 to 61.

had of course already been agreed and was in operation. However, despite this the Commissioner recognises that given the particular political circumstances it is plausible for the Scotland Office to argue that policy discussions in respect of the agreement, and the funding consequences that flow from it, remained ongoing and live in May 2018. As a consequence of this the Commissioner accepts that the safe space arguments are relevant. Furthermore, the Commissioner accepts that disclosure of the information withheld on the basis of section 35(1)(a) would have been likely to result in significant public and media attention in respect of the Scotland Office's deliberations on this issue. Consequently, in the circumstances of this case the Commissioner believes that significant weight should be attributed to the safe space arguments.

27. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions. As noted above, the Commissioner accepts that the policy making in relation to this issue remained ongoing at the time of the request. In light of the sensitive nature of the matters under discussion and the ongoing nature of the policy making, the Commissioner accepts that the chilling effect arguments in this case should be given considerable weight in relation to the information withheld on the basis of section 35(1)(a).
28. With regard to attributing weight to the public interest arguments in favour of disclosure, the Commissioner recognises that there is a considerable public interest in the agreement and more specifically in this context the policy discussions surrounding the funding implications for other regions with the UK. In the Commissioner's view, and in contrast to the Scotland's Office's position, disclosure of the information would add to the public's understanding of such policy discussions beyond the information already contained in the public domain. Albeit, she accepts that the disclosure of the information would be unlikely to serve all of the particular public interests identified by the complainant.
29. On balance, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 35(1)(a) of

FOIA. In reaching this view she fully acknowledges the public interest in this issue. However, given that at time of the request policy making remained ongoing and in the Commissioner's view this tips the balance of the public interest in favour of maintaining the exemption given the cumulative weight that should be attributed to the safe space and chilling effect arguments.

Section 28 – Relations within the United Kingdom

30. The Scotland Office argued that the remainder of the withheld information (in addition to the information which the Commissioner has already concluded is exempt from disclosure on the basis of section 35(1)(a)) is exempt from disclosure on the basis of section 28(1) of FOIA. This states that:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration.'

The Scotland Office's position

31. In its internal review response the Scotland Office argued that it was clear that on a careful examination of the information withheld on the basis of this exemption, disclosure would be likely to prejudice relations between the UK and Scottish government. In support of this position it noted that it was essential that Ministers and officials within all four administrations are confident that they can communicate with one another directly and candidly and that the confidentiality of their communications will be respected.
32. In its submissions to the Commissioner the Scotland Office explained that this expectation of confidentiality of discussion between Ministers is well established in convention and practice, and is explicitly set out in the 'Devolution Memorandum of Understanding' agreed between the United Kingdom Government and the Scottish Ministers, which acknowledges that 'Each administration can only expect to receive information if it treats such information with appropriate discretion (paragraph 12).⁴ In order to support its reliance on section 28(1) the

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<https://www.gov.scot/binaries/content/documents/govscot/publications/agreement/2013/10/devolutionmou/documents/2f5a6984-a146-48df-b206-877086b7150b/2f5a6984-a146-48df-b206-877086b7150b/govscot%3Adocument>

Scotland Office's submissions also made reference to the specific content of the withheld information. Clearly, the Commissioner cannot refer to such submissions in this decision notice, albeit she can note that the Scotland Office argued the content of the information itself – allied to the established practice referred to above – meant that disclosure would be likely to result in the prejudice envisaged.

The Commissioner's position

33. In order for a prejudice based exemption, such as section 28(1), to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
34. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Scotland Office clearly relates to the interests which the exemption contained at section 28(1) is designed to protect. With regard to the second criterion given the established custom and practice in respect of confidentiality of discussions between Ministers in different administrations, and taking into account the content of the withheld information, the Commissioner accepts that there is clearly a causal link between disclosure of the information and prejudice occurring. Furthermore, she is satisfied that the resultant prejudice would be real and of substance. Moreover, the Commissioner is satisfied that the third criterion is met given the content of the withheld information itself,

allied to the broader – and ongoing - political sensitives surrounding the agreement and its consequential funding implications.

35. Section 28(1) is therefore engaged.

Public interest test

36. Section 28 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 28(1) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

37. The complainant's arguments for disclosing the information are set out above.

Public interest arguments in favour of maintaining the exemption

38. The Scotland Office argued that it was essential that Ministers and officials in all four administrations are confident that they can communicate with one and another directly and candidly and that the confidentiality of their communications will be respected.

Balance of the public interest arguments

39. For the reasons discussed above, the Commissioner agrees that there is a public interest in disclosure of the withheld information in order to further inform the public about the government's considerations of the matters concerning the funding implications of the agreement. Furthermore, the Commissioner agrees that there is a general public interest in the disclosure of information which would add to the public's understanding of relations between the UK and Scottish governments, and moreover in the specific circumstances of this case, a particular public interest in the disclosure of information concerning discussions about the agreement. Conversely, the Commissioner believes that there is a significant public interest in ensuring that effective relations exists between the UK and the other administrations. The Commissioner is conscious that disclosure of the withheld information risks prejudicing not just the UK's relations with the Scottish government in respect of this issue, but risks undermining the candour and confidentiality of communications between the two on other issues in the future. Given these wide ranging consequences, and fact that policy making remained live, and despite the public interest in disclosure of the information, the Commissioner has concluded that the public interest favours maintaining the exemption contained at section 28(1) of FOIA.

Right of appeal

40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

41. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF