

Decision Notice

Decision 190/2014 Mr Andrew Dundas and the Scottish Ministers

Legal advice: access to Scottish universities

Reference No: 201400789

Decision Date: 04 September 2014



Scottish Information
Commissioner

Summary

On 31 January 2014, Mr Dundas asked the Scottish Ministers (the Ministers) for information relating to legal advice on access to Scottish universities. The Ministers responded by withholding some of the information under the exemption relating to the effective conduct of public affairs. Following an investigation, the Commissioner accepted this.

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)

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

1. On 31 January 2014, Mr Dundas wrote to the Ministers, referring to his understanding that the Deputy First Minister had declared that the Ministers had particular legal advice on entry to Scottish universities by students from the remainder of the UK. He asked for
 - a) a copy of documents confirming the identity or status or nature of the provider of that advice, and the form in which the Scottish Government had sought the advice
 - b) what policy advice the Scottish Government had received from the European Commission or British Government about the effects of the “exceptional circumstances” he understood the advice to refer to on an independent Scotland and the remainder of the UK, and in relation to charging higher fees for applicants from other EU States. He asked who provided that advice (where that person was not an EU Law Officer at the time) and when it was provided.

He stated that he was not asking for a copy of any legal opinion on the matter of the exceptional circumstances, but simply who provided the advice, when they provided it, why they provided it, and whether it was conditional.

2. Mr Dundas received no response to his request within 20 working days, so he wrote to the Ministers again on 10 March 2014, requesting a review in respect of their failure to respond.
3. The Ministers notified Mr Dundas of the outcome of their review on 2 April 2014. They confirmed that they had sought and obtained legal advice on the subject matter of his request, in writing. They withheld the source of the advice under section 30(c) of FOISA, but confirmed that they had received no policy advice from the EU or the British Government on the matter.
4. On 4 April 2014, Mr Dundas 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.

5. The application was validated by establishing that Mr Dundas 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

6. On 23 April 2014 the Ministers were notified in writing that an application had been received from Mr Dundas and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
7. The Ministers provided further information to Mr Dundas on 12 May 2014 which explained why the legal advice was sought. They reiterated that they were withholding the source of the advice under section 30(c) of FOISA and added that they were also withholding the dates the advice was sought and provided, under sections 30(c) and 36(1) of FOISA.
8. Mr Dundas wrote again to the Commissioner on 12 May 2014, confirming that he wished to go ahead with his application. He still considered it important to know who provided the advice and when.
9. 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. These focused on the Ministers' application of sections 30(c) and 36(1) of FOISA.
10. The Ministers provided submissions to the investigating officer. Mr Dundas also provided comments on why he believed it was in the public interest for the information to be disclosed.

Commissioner's analysis and findings

11. 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 Dundas and the Ministers. She is satisfied that no matter of relevance has been overlooked.

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

12. Section 30(c) 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 disclosure of the information, and how that harm would be expected to follow from such disclosure.
13. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility.

14. The Commissioner takes the view that it is important for public authorities to treat each request for information individually. Release of information in one case should not be taken to imply that information of a particular type will routinely be released in future. The circumstances of each case, including the content of the information under consideration and the timing of the request, must be taken into consideration.
15. The Ministers submitted that disclosure of the dates when the legal advice was sought and received, and of who the advice was sought from, would be likely to prejudice the effective conduct of public affairs substantially.
16. They believed disclosure of the source of the advice would be likely to lead to conclusions being drawn from the fact that any particular lawyer, or group of lawyers, had (or had not) been asked for advice on a particular matter, which would significantly impair their ability to develop policy on tuition fees in the event of a vote in favour of independence.
17. More particularly, the Ministers argued that disclosing who advice was sought from could substantially prejudice the effective conduct of public affairs by breaching the Law Officer Convention. It would reveal whether or not the Law Officers had been asked for, and given, legal advice on this particular topic, which would in turn encourage people to draw conclusions regarding the importance placed by Government on the subject matter of the request and the nature of the concerns which had led to the advice being sought. As a result, the Ministers believed undue pressure would be placed on Ministers and officials to consider such factors in the future before deciding whether to consult Law Officers.
18. With regard to when they sought or received legal advice, the Ministers argued that disclosure would be likely to lead to conclusions being drawn based on these facts. Events in the Parliament or in the press at the time the advice was provided might, for example, be interpreted as having a bearing on the decision to seek advice, due to concern about the Scottish Government's position. They also highlighted the number of times advice had been sought, and the length of time taken to provide that advice, as factors likely to lead to (potentially unwarranted) inferences being drawn.
19. The Ministers submitted that all of these factors would be likely to significantly harm the effective conduct of government business, by dissuading officials and/or Ministers from requesting legal advice as and when they needed it, for fear of dates being divulged and subjected to public and media speculation. The Ministers stated that disclosure could also put lawyers under greater pressure to provide advice at particular times, to avoid conclusions being drawn as to events the advice might be linked to. This could impact on the quality of legal advice provided in future, they argued, especially where lawyers had to provide advice more quickly than they would otherwise.
20. The Commissioner has considered these arguments carefully. As in *Decision 103/2014 Mr Alisdair MacPherson and the Scottish Ministers*¹, she finds elements of them to be overstated. Having considered the arguments in relation to the particular information under consideration here and its context, she also finds that the conclusions of that decision, in relation to the Law Officer Convention and the risk of undesirable pressure resulting from disclosure of the time taken to obtain advice, apply equally in this particular case. She therefore accepts that the Ministers were entitled to conclude that the information was exempt under section 30(c) of FOISA.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201400129.aspx>

21. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA, so the information must be disclosed unless (in all the circumstances of the case) the public interest in maintaining the exemption outweighs that in disclosure.
22. Mr Dundas believed the date the advice was provided to be important, because it would confirm whether the Scottish Government's "Scotland's Future" White Paper was written with the benefit of that advice. He stated that it was important for the public to know who had provided the advice because, in his view, *anyone* might provide advice on a matter of law but only Law Officers could rely on their convention. Overall, he believed it important to know whether the advice was timely and whether it was provided by a suitably qualified and impartial source. He highlighted the importance of the matter under consideration in the context of the forthcoming referendum.
23. With regard to the public interest, the Ministers highlighted the importance of maintaining the Law Officer Convention, as outlined in *Decision 103/2014*. Also as in that decision, they emphasised the importance of Ministers and officials being able to seek advice as and when they saw fit (and needed it), and for lawyers to be able to provide their advice when they were ready to do so, without undue scrutiny as to why advice was sought or provided at a particular time. They highlighted the risk of placing lawyers under pressure to provide advice too quickly, as described above. Again, they could identify no exceptional circumstances in this case which would justify the disclosure of the information.
24. After weighing up carefully the submissions provided by both Mr Dundas and by the Ministers, the Commissioner acknowledges that there is a general public interest in transparency in the conduct of public affairs. She acknowledges that the advice in question relates to public policy issues of some significance, and accepts that in some circumstances there could be a public interest in knowing when advice was sought and given, as this may provide reassurance about the Minister's approach and decision-making. The Commissioner does not accept that it follows that there is a strong public interest in knowing who provided the advice.
25. On the other hand, the Commissioner accepts that there are strong public interest arguments in this case, as in *Decision 103/2014* and as summarised in paragraph 23 above, for maintaining the exemption in section 30(c).
26. On balance, the Commissioner is of the view that more weight should be attached to the arguments which would favour withholding the information. In all the circumstances of this case, she concludes that the public interest in disclosing the information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. As a result, the Commissioner finds that the Ministers were entitled to withhold the information to which they applied this exemption.
27. As the Commissioner has upheld the application of section 30(c) of FOISA in this case, she is not required to go on to consider the exemption in section 36(1).

Decision

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

Appeal

Should either Mr Dundas 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
04 September 2014

Appendix

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.

...

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.

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info