

Decision Notice 048/2022

Legal advice on second independence referendum in 2020

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202100457



Scottish Information
Commissioner

Summary

The Scottish Ministers were asked for any legal advice to Ministers or provided by the Civil Service on the topic of a second independence referendum in 2020.

The Ministers refused to disclose information to the Applicant as they considered to do so would breach legal professional privilege.

The Commissioner investigated and found that the Ministers had partially complied with FOISA in responding to the request. He found that the Ministers had only been entitled to withhold some of the information falling within scope of the Applicant's request under the relevant exemption.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 36(1) (Confidentiality)

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 20 January 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was: any legal advice to Ministers or provided by the Civil Service on the topic of a second independence referendum in 2020.
2. The Ministers responded on 15 February 2021. In doing so, the Ministers stated that they aimed to provide information wherever possible but, on this occasion, they considered that the exemption in section 36(1) of FOISA applied to the requested information. The Ministers believed disclosure of the information would breach legal professional privilege.
3. Having considered the application of the public interest test, the Ministers acknowledged that disclosure of the information would form part of open and transparent government and would inform public debate. However, they considered this to be outweighed by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials were able to receive legal advice in confidence, like any other public or private organisation.
4. On 22 February 2021, the Applicant wrote to the Ministers, requesting a review of their decision on the basis that he did not agree with the result reached by the Ministers in their consideration of the public interest test. The Applicant considered it to be a matter of huge public interest and, if a second referendum had been deemed unlawful or advice had been provided to that effect, given its inclusion on at least two party manifestos going into the forthcoming election, that should be made public as it would aid discussion of a key aspect of public debate.
5. The Ministers notified the Applicant of the outcome of their review on 22 March 2021. The Ministers upheld their original decision to rely on the exemption in section 36(1) of FOISA and provided further explanations why they considered the balance of the public interest to favour withholding the information.

6. On 12 April 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because he believed the subject matter of his request to be the very definition of public interest. While the Applicant accepted the arguments that legal advice to Ministers and legal professional privilege were of the utmost public interest to uphold, he argued that legal advice around the legality of a second independence referendum was equally, if not more, in the public interest to be disclosed than not. The Applicant set out, in detail, why he considered this to be the case, and why he believed this to be one of the very few exceptions to legal professional privilege, given that it concerned attempts to radically change the constitution of the UK.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 20 April 2021, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers was asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
9. 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 to answer specific questions. These questions sought clarity over whether the Ministers were arguing that the withheld information was subject to legal advice or litigation privilege, as well as their consideration of where the balance of the public interest lay.

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 him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.
11. In *Scottish Ministers v Scottish Information Commissioner* [2006] CSIH 8¹, at paragraph [18], the Court of Session recognised that: "in giving reasons for his decision, [the Commissioner] is necessarily restrained by the need to avoid, deliberately or accidentally, disclosing information which ought not to be disclosed."
12. In this case, the Commissioner is unable to set out the Ministers' (or his own) reasoning in full as doing so could itself lead to the disclosure of the contents of the information which has been withheld by the Ministers.

¹ [SCOTTISH MINISTERS \(WITH SUMMARY\) v. SCOTTISH INFORMATION COMMISSIONERS ETC \(scotcourts.gov.uk\)](https://scotcourts.gov.uk)

Section 36(1) - Confidentiality

13. Section 36(1) of FOISA exempts from disclosure information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings. One type of communication covered by this exemption is that to which legal advice privilege, a form of legal professional privilege, applies. Legal advice privilege covers communications between lawyers and their clients in the course of which legal advice is sought or given.
14. For the exemption to apply to this particular type of communication, certain conditions have to be fulfilled:
 - (i) The information must relate to communications with a professional legal adviser, such as a solicitor or advocate;
 - (ii) The legal adviser must be acting in their professional capacity; and
 - (iii) The communications must occur in the context of the legal adviser's professional relationship with their client.
15. The Ministers argued that legal advice privilege applied to the withheld information as it all related to communications with, or references to communications with, in-house legal advisers acting in their professional capacity, the Scottish Government being the client to whom legal advice was being provided.
16. The Ministers submitted that all of the material was either made or affected for the principal or dominant purpose of seeking or giving legal advice, or evidenced those communications.
17. Disclosure of the withheld information would, in the Ministers' view, breach legal professional privilege by divulging information about the points considered by lawyers, to the extent of their comments and issues being flagged up for further consideration. The Ministers considered all necessary conditions for legal advice privilege were satisfied.
18. The Ministers also argued that a claim to confidentiality in legal proceedings could be maintained because the withheld information was only shared between the Scottish Government and its legal advisers. Therefore, the information remained confidential at the time they responded to the Applicant's request and requirement for review and this remained the case. Accordingly, legal professional privilege in relation to this information had not been waived.
19. After considering the content, the Commissioner is not satisfied that all of the information withheld by the Ministers falls within scope of the Applicant's request. The Commissioner will only consider those parts of the withheld information that come within scope of the Applicant's request in what follows.
20. Having considered the content of the withheld information that does fall within scope of the Applicant's request, and the circumstances in which it was created, the Commissioner accepts that all of this withheld information meets the conditions for legal advice privilege to apply.
21. The exemption in section 36(1) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The exemption can only be upheld if the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption (and withholding it).

The public interest

Applicant's submissions

22. In his application to the Commissioner, the Applicant considered there were strong arguments for disclosing the withheld information.
23. The Applicant commented that, since his initial request, there had been a Scottish Parliamentary election where a clear parliamentary majority supporting Scottish independence was elected to Holyrood. This, the Applicant noted, was a repeat of the result in 2016, with both the SNP and Scottish Greens stating a second independence referendum and independence itself was a key manifesto commitment. The Applicant therefore considered the publication of legal advice to the Scottish Government (particularly in light of the potential cooperation agreement between the two parties) was more in the public interest than prior to the election.
24. The Applicant noted that this case came down to the interpretation of the public interest and the competing factors that came into play. The Applicant stated that he accepted, understood and valued the extremely high public interest in keeping legal advice confidential, and agreed that legal professional privilege was a key aspect of any reasonable government.
25. However, the Applicant submitted that in recent months the Scottish Government had dispensed with the tradition of keeping legal advice secret under almost all circumstances, when it released several pages of legal advice around the Alex Salmond harassment complaints scandal. In doing so, the Scottish Government said it was "not normal" and would help establish the truth of the matter, dispelling myths and mistruths about the legal case fought by the government in 2018/2019.
26. The Applicant argued that the advice he was seeking was more fundamental to democracy, accountability and transparency than the arguments for release in the Alex Salmond case and it followed that the public interest lay in releasing this information rather than failing to disclose it.
27. In his submissions, the Applicant also pointed to the well-understood principle of FOISA that information should be accessible in order to enable enhanced scrutiny of public bodies and decision-making processes, thereby improving accountability and participation in democracy.
28. In this case, the Applicant considered it clear that legal advice pertaining to a second independence referendum would improve scrutiny of the new Scottish Government in its plans to push forward with holding such a vote, in particular around the potential for passing legislation that could lead to extremely expensive court action.
29. The Applicant considered it undisputable that legal action around such a central policy of huge impact on every person living in Scotland would improve scrutiny, transparency and accountability of ministers making decisions about how to go about gaining Scottish independence. He commented that it was in the public interest prior to the election in May for this information to be in the public domain, so voters could make an informed decision about the lawfulness of the planned policies of the SNP. Since their victory, that ability to hold politicians to account would be strengthened with disclosure of this information and weakened by failing to disclose the information. He described accountability and scrutiny, in this case, as the key tenets of the public interest test, and submitted that non-disclosure of legal advice on this issue would actively harm accountability and scrutiny and would be counter to the public interest.

30. The Applicant also argued that legal professional privilege is not inalienable. He commented that FOISA exists as legislation whereby members of the public can, where appropriate, override such confidentiality and privilege.

Scottish Ministers' submissions

31. In their submissions on the public interest test, the Ministers recognised the public interest in disclosure as part of an open, transparent and accountable government. They also acknowledged the strong public interest in relation to the topic of a second independence referendum, and that disclosure of the legal advice could provide a greater public understanding in that regard and so inform public debate.
32. The Ministers also noted that, if a Bill was introduced into the Scottish Parliament, the public interests they had identified would be satisfied, at least in part, by the following factors:
- (i) The provision of further information about a Bill in its accompanying documents
 - (ii) The fact that it is publicly acknowledged that the Scottish Law Officers advise on the legislative competency of Scottish Government Bills
 - (iii) The process of Parliamentary scrutiny itself.
33. In the Ministers' view, there was a very strong public interest in maintaining the exemption relating to legal professional privilege in this case, for the following reasons:
- (i) It remains important in all cases that lawyers can provide free and frank legal advice, which considers and discusses all issues and options, without fear that the advice may be disclosed and, as a result, potentially taken out of context.
 - (ii) In areas such as this, which are the subject of political debate, an expectation that legal advice could be released would inevitably lead to the legal advice being much more circumspect and therefore less effective.
 - (iii) In preparing legislation, in particular, it is vital that lawyers, officials and Ministers have the private space to fully and frankly consider legislative proposals. Candour in framing legislation is essential and advice is provided about how the policy can be given effect to on the basis of draft provisions. It is crucial for this information to be exchanged to ensure that the Bill gives effect to the policy. Policy and legal issues need to be identified and explored in an environment that enables, fosters and protects a free and frank exchange of legal views to enable final decisions to be taken about how and whether to take forward Bill proposals.
 - (iv) The Ministers concluded that there was a strong public interest in protecting the confidentiality of this information, in order to ensure that the Scottish Government was able to discuss and take policy decisions in full possession of thorough and candid legal advice. This would ensure that the Scottish Government could take decisions in a fully-informed legal context, having received legal advice in confidence as any other client would.
34. On balance, the Ministers considered that in this instance the public interest in maintaining the exemption in section 36(1) outweighed that of disclosure, given the overriding public interest in maintaining the confidentiality of communications between lawyers and their clients and the public interest in allowing for full and detailed internal consideration of legal issues in relation to the consideration of legislative proposals.

Commissioner's conclusions

35. As the Commissioner has noted in a number of previous decisions, the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. In a freedom of information context, the strong inherent public interest in maintaining legal professional privilege was emphasised by the High Court (of England and Wales) in the case of *Department for Business, Enterprise and Regulatory Reform v Information Commissioner and O'Brien [2009] EWHC 164 (QB)*². Generally, the Commissioner will consider the High Court's reasoning to be relevant to the application of section 36(1) of FOISA.
36. The Commissioner accepts that there is a considerable, in-built, public interest in maintaining the ability of the Ministers to receive full, unhindered legal advice.
37. However, as the Applicant pointed out in his submissions, this is not inalienable. For example, the Scottish Ministerial Code recognises (para 2.40 on page 7) that there are exceptions to the convention of not disclosing legal advice:
- If, in exceptional circumstances, Ministers feel the balance of public interest lies in disclosing either the source or the contents of legal advice on a particular matter, the Law Officers must be consulted and their prior consent obtained. Such consent will only be granted where there are compelling reasons for disclosure in the particular circumstances.*³
38. Therefore, the Scottish Ministerial Code envisages that legal advice can be disclosed in exceptional circumstances.
39. In line with this, and as the Commissioner explained in *Decision 002/2020*⁴ at paragraph 45, there are factors which may outweigh the public interest in maintaining the exemption in section 36(1) of FOISA. These factors include a situation where a large number of people are affected by the legal advice concerned.
40. The Commissioner considers it to be obvious that the question of a second independence referendum in Scotland is of significant public interest for a substantial portion of the Scottish population. This is particularly the case given that both parties involved in the present Scottish Government had this as a key part of their respective election manifestos.
41. The Commissioner notes the Applicant's view that keeping legal advice relating to a second independence referendum secret actively harms accountability and scrutiny and would be counter to the public interest. Given the fundamental importance of Scotland's future constitutional relationship to all individuals living in Scotland, and its fundamental importance to political and public debate at the time of the request and requirement for review, the Commissioner is satisfied that disclosing this information would significantly enhance public debate on this issue.
42. While the Ministers have expressed concern that disclosure of legal advice in this case would have the effect of future legal advice being more circumspect or less effective, the Commissioner acknowledges the point made by the Applicant that the Ministers' own decision to disclose legal advice relating to the Alex Salmond case has already created such an environment, if the risk were there, and a further disclosure of legal advice which is of much greater public interest is unlikely to create any further difficulty. Furthermore, the

² [http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=\(title:\(+o'brien+\)\)](http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/QB/2009/164.html&query=(title:(+o'brien+)))

³ [Scottish Ministerial Code: 2018 edition - gov.scot \(www.gov.scot\)](http://www.gov.scot/Resource/0045/0045_0001_0000.pdf)

⁴ [Decision 002/2020 \(itspublicknowledge.info\)](https://itspublicknowledge.info/decision/002/2020)

decision of the Ministers to disclose the legal advice in the Alex Salmond case clearly shows that they recognise that there can be compelling public interest reasons for disclosure of legal advice received.

43. For the reasons set out above, and having regard to the submissions of the parties and the withheld information, the Commissioner has concluded that, in this case, the substantial public interest in disclosure of some of the withheld information falling within scope of the Applicant's request should be considered one of the exceptional circumstances which outweighs the in-built public interest in maintaining the exemption in section 36(1) of FOISA.
44. The Commissioner therefore requires the Ministers to disclose to the Applicant the information detailed in a separate schedule, to be provided to the Ministers.

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 the Applicant.

While he finds that some of the information is exempt from disclosure under section 36(1) of FOISA, this is not the case for all of the information. By failing to disclose information which is not exempt under section 36(1), the Ministers failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to disclose to the Applicant the information detailed in a schedule to be provided to the Ministers, by **10 June 2022**.

Appeal

Should either the Applicant or the 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.

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Daren Fitzhenry
Scottish Information Commissioner

26 April 2022

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.

...

- (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.

...

36 Confidentiality

- (1) Information in respect of which a claim to confidentiality of communications could be maintained in legal proceedings is exempt information.

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