

# Decision Notice 128/2022

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## Report on implementing a 48-hour working week for Junior Doctors

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**Applicant: The Applicant**

**Public authority: Scottish Ministers**

**Case Ref: 202100569**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for the report submitted on 3 January 2020 to the Cabinet Secretary for Health and Sport by the Junior Doctors' 48-hour Expert Working Group. The Ministers disclosed some information, but withheld other information. The Ministers subsequently disclosed the report in full. The Commissioner found that the Ministers had breached FOISA in responding to the request. Although the report was disclosed in full during the investigation, the Commissioner found that the Ministers were not entitled to withhold it at the time of the request or review.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General Entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b)(i) (Prejudice to effective conduct of public affairs)

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

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1. On 21 October 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was:  
*... the Report to the Cabinet Secretary for Health and Sport by the Junior Doctors' 48-hour Expert Working Group, chaired by Professor Philip Cachia ... believed to have been submitted to the Cabinet Secretary on 3 January 2020. The subject matter is the result of work undertaken by the Expert Working Group to develop "risk assessed options for implementing a 48-hour working week (without averaging) taking in to consideration junior doctor wellbeing, the effects on education and training, continuity of safe and effective service provision and the impact on other staff." ... (the Report)*
2. The Ministers responded on 26 November 2020 and provided some of the information requested but withheld the rest under section 29(1)(a) (Formulation or development of Scottish Administration policy etc.) of FOISA.
3. On 12 January 2021, the Applicant wrote to the Ministers requesting a review of their decision on the basis that:
  - i) he considered the Report had been discussed with another external organisation and reasoned that, if it was in the public interest to discuss it there, it was no less in the public interest to publish the Report
  - ii) he referred to Parliamentary Written Answer [S5W-32711](#)<sup>1</sup>, referring to publication of the Report at "the first available opportunity"
  - iii) he believed the public interest favoured disclosure of the information.
4. The Ministers notified the Applicant of the outcome of their review on 8 February 2021, upholding their decision with modifications. They maintained that some of the information previously withheld under section 29(1)(a) remained exempt from disclosure under that

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<sup>1</sup> [Written questions and answers | Scottish Parliament Website](#)

exemption, but that some of the information previously withheld under section 29(1)(a) was now withheld under section 30(b)(i) (which relates to substantial prejudice to the free and frank provision of advice).

5. On 29 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 Minister's review because he disagreed with the exemptions applied by the Ministers and considered the balance of public interest lay in disclosure of the information.

## **Investigation**

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6. 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.
7. On 11 May 2021, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were 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.
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 to answer specific questions. These related to their reasons for applying sections 29(1)(a) and 30(b)(i) of FOISA to the withheld information.
9. During the investigation (25 August 2021), the Ministers disclosed further information to the Applicant and changed their position in relation to the information falling under the exemptions claimed. Some further information was disclosed to the Applicant, whilst most of the remaining information previously withheld, following the Minister's review, under section 30(b)(i) (bar one paragraph) was now being withheld again under section 29(1)(a). This remaining paragraph continued to be withheld under section 30(b)(i).
10. As the Ministers were withholding information under exemptions which are subject to the public interest test, the Applicant was also invited to provide submissions on the public interest in disclosure of the information.
11. Both parties provided submissions to the Commissioner.
12. On 6 October 2021, the Ministers provided the Applicant with all of the previously withheld information, i.e. a copy of the full report he had requested. They maintained, however, that they had been correct to withhold the information in response to the Applicant's information request and requirement for review.

## **Commissioner's analysis and findings**

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13. 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.

### **Section 29(1)(a) – Formulation of Scottish Administration policy etc.**

14. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish

Administration and their staff) is exempt information if it relates to the formulation or development of government policy.

15. "Formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
16. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into policy action and/or legislation, and when.

#### *Background*

17. In March 2017, the First Minister made a statement to the Scottish Parliament, committing to reduce junior doctor working hours to a maximum of 48 hours per week without averaging. An expert group was set up in March 2018 to explore options and changes necessary to achieve this, and subsequently produced the Report that is the subject of this request.
18. On 9 November 2020 the then Scottish Health Secretary, in answer to a parliamentary question ([S5W-32711](#)) asked on 22 October 2020 about the publication of this report stated:  
*We have received the final report from the independent expert working group.*  
*The pandemic response remains a priority and we have agreed with BMA Scotland that this report and its important recommendations will be released at the first available opportunity...*

#### *Submissions from the Ministers on section 29(1)(a)*

19. The Ministers argued that the information withheld in the Report related to the development of Scottish Government's policy with respect to the commitment to reduce junior doctor working hours to a maximum of 48 hours per week without averaging.
20. The Ministers considered that the development of this policy was very much a live matter, which remained at an early stage of the policy process where options and risks were still being identified and considered. It was still under development.
21. They submitted that the Expert Working Group was formed in response to a commitment made by the First Minister to change an existing policy, and its report was central to the next stages of development and formulation of that policy.

#### *Submissions from the Applicant*

22. In his submissions, the Applicant highlighted that in the space of nine months the Ministers had provided him with three different versions of the Report, each claiming different exemptions from the last, and questioned the consistency and validity of their approach.
23. The Applicant also referred to the answer provided by the then Secretary for Health regarding the intention to publish the Report (see paragraph 18).
24. The Applicant drew attention to examples of text that had previously been withheld by the Ministers but provided to him in a later version, commenting on the innocuous nature of the information and questioning why it had previously been withheld.

25. The Applicant further commented on errors in document management between the versions he was provided with and concluded that it exhibited a lack of attention to detail and disrespect towards the public.

#### *The Commissioner's conclusions*

26. For information to be exempt under section 29(1)(a) of FOISA, it only has to "relate to" the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Ministers, who will subsequently determine which of these should be translated into political action and when.
27. Having considered the withheld information, the Commissioner is satisfied that it relates to the formulation or development of Government policy and, accordingly, that the exemption in section 29(1)(a) of FOISA is engaged.
28. The Commissioner accepts that this report was produced by a working group set up specifically to explore the options and changes required to achieve this change in Government policy, i.e. reducing junior doctor hours to a maximum of 48 hours a week without averaging.
29. The exemption in section 29(1)(a) 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. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on to consider whether the, in all of the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

### **The public interest**

#### *The Ministers' public interest submissions*

30. The Ministers acknowledged that the reduction in junior doctor working hours to a maximum of 48 hours per week without averaging was a key commitment of the Scottish Government and that there was some public interest in the policy development and implementation. They also recognised a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate.
31. However, they submitted that there was greater public interest in high quality policy and decision making and that this meant Ministers and officials being able to consider all available options and to debate those rigorously. They argued this included consideration of the Report, commissioned to help inform the policy approach, but that this approach still required substantial discussion and debate before the final policy position was agreed.
32. The Ministers considered disclosing information whilst the issue remained live would result in a danger that arguments could be taken out of context, be open to misrepresentation or perceived to be misleading, as the Report was focused on a relatively small, specific cohort of staff in a working situation that had since substantially changed.
33. The Ministers argued that premature disclosure would seriously undermine internal debate on the options available to successfully reduce junior doctor working hours to a maximum of 48 hours per week without averaging, which in turn would undermine the quality of the policy making process. It might also discourage organisations such as the BMA and the Royal Colleges of Medicine from working with the Scottish Government in undertaking further work in this area, if the Report were disclosed prior to the position being fully considered by organisations critical to the implementation of any proposed policy changes. This would not be in the public interest.

34. The Ministers argued that the concerns and caveats highlighted in the Report were made more widely evident throughout the progression of the pandemic response, and it was felt appropriate to publish the Report as the DELTA variant wave started to diminish in Autumn 2021.

#### *The Applicant's public interest submissions*

35. The Applicant submitted that the information he requested concerned matters of serious concern and benefit to the public. He argued that the campaign for the implementation of a 48-hour maximum working week (without averaging) for junior doctors had public support. He considered health care and its delivery, while always of public interest, assumed greater significance during the Covid-19 pandemic when the dangers to personal safety and overwork faced by those providing the healthcare has been well publicised.
36. The Applicant highlighted that, when this health emergency had passed, junior doctors and their medical colleagues were likely to face substantial work pressure to deal with the healthcare that had not been prioritised during this period. He believed the public had a right to be kept informed about the risks and dangers junior doctors would experience if they continued to work excessive hours, and how the delivery of healthcare and medical outcomes would be compromised if junior doctors' hours remained unchanged.
37. The Applicant believed publication of the Report would ensure scrutiny of any decisions the Scottish Government made and would ensure the public were adequately informed of decisions that were serious and of benefit to them.
38. The Applicant considered publishing the Report would help to hold the Scottish Government to account and ensure that junior doctors' working hours became safer.

#### *The Commissioner's conclusions of the public interest*

39. The Commissioner has considered carefully the representations made by both the Applicant and the Ministers when balancing the public interest both for and against disclosure of the information.
40. The Commissioner acknowledges that there is considerable public interest in allowing the Ministers space to develop policy, and that the circumstances within the NHS have changed considerably during the pandemic.
41. However, this is clearly a matter of public concern, in relation to which the Ministers have made a policy commitment. The Commissioner can accept that there is a public interest in understanding how work on implementing that commitment is progressing, and that extends to understanding the expert advice commissioned to inform policy development.
42. The Ministers had clearly stated their intention to publish the Report (see paragraph 18), and the Commissioner can see nothing that happened in the interim period of time until the report was published in full, that has changed the balance of public interest from supporting withholding the information to allowing full publication.
43. The Commissioner considers the Report is a completed piece of work, which the Ministers are free to be guided by as they consider appropriate, in an environment in which more recent developments, such as the experience of the pandemic, may also be relevant. It is not apparent why either the remit or the context of the Report should inhibit consideration of wider or more current issues by the Ministers.
44. The Commissioner is concerned that some of the redactions made in the version of the Report provided to the Applicant at the time of his request, could have led the reader to

misconstrue the outcome of the Report (particularly in relation to the issues considered under section 30(b)(i) below).

45. The Commissioner has carefully weighed the public interest in both disclosing the information and maintaining the exemption. In all the circumstances of this case, he is satisfied that the public interest in maintaining the exemption is outweighed by the public interest in disclosing the information. There is a strong public interest in allowing the public access to all of the Report, with all of the reasoning and circumstances set out, allowing the public to see how the conclusions of the Report were reached.
46. As the public interest in maintaining the exemption is outweighed by that in disclosure of the information, the Commissioner finds that the Ministers were not entitled to rely on section 29(1)(a) in responding to this request. As the Report has now been published and provided to the Applicant in full, no action is required.

### **Section 30(b)(i) – Prejudice to effective conduct of public affairs – free and frank provision of advice**

47. Section 30(b)(i) of FOISA provides that information is exempt information if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. The inhibition must be substantial, in other words of real and demonstrable significance. It must also be at least likely, not simply a remote or hypothetical possibility. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
48. In the final version of the Report provided to the Applicant, before the whole report was disclosed, only one sentence in one section of the document was being withheld under this exemption.

#### *Submissions from the Ministers on section 30(b)(i)*

49. The Ministers, in the review outcome, applied this exemption to much of the information they had initially withheld under section 29(1)(a) in their initial response.
50. The Ministers considered that, although the advice was provided by professionals acting in their professional capacity, and who would be expected to provide advice as part of their professional duties, disclosing that advice could lead officials to conclude that other internal communications would probably have to be disclosed, thereby inhibiting the way advice was given in future. They argued that there was a need for officials to have a private space within which to seek advice before making recommendations to Ministers.
51. As previously stated, the Ministers changed position during the investigation, providing the Applicant with some of the previously withheld information, and withholding all of the remaining information, bar one paragraph, under section 29(1)(a) again.
52. The Ministers argued that section 30(b)(i) applied to the information in that remaining paragraph as it was the opinion of a lay member of the working group which went against the overarching finding of the Report. They were concerned that disclosure of what they saw as a dissenting opinion would engender concerns amongst the public and the medical service, and would detract from the overall aim of the Report and its subsequent development.
53. The Ministers were concerned that disclosing this frank opinion could inhibit other individuals in similar circumstances could be inhibited from voicing an opinion. They argued stakeholders would be reluctant to express their views fully and frankly if those views were likely to be made public, particularly where decisions had not yet been taken in relation to next steps.

54. The Ministers submitted that disclosure of this particular paragraph could have thrown doubt on the viability of the overall conclusions of the group, and they were concerned this would result in focus on a perceived weakness in the group's work, and on its effectiveness. They believed this could have resulted in unwillingness to participate in further such inquiries, with challenging effects on the formulation of such vital work.

*Submissions from the Applicant on section 30(b)(i)*

55. The Applicant considered that, in their review response, the Ministers provided no evidence that professionals acting in their capacity would be inhibited in the provision of advice in the future. He also highlighted what he considered to be the vague and speculative nature of the arguments put forward and commented that they could be used to justify refusal of any and every FOI request containing advice from professionals. In his view, this would make a mockery of the fundamental right of a person to receive information from any public authority given advice by professionals acting in their professional capacity, especially relating to matters of serious concern and public benefit.

*The Commissioner's conclusions*

56. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
57. While the Commissioner accepts that officials must (in appropriate circumstances) have space to obtain and consider advice, he is not persuaded that disclosure of the information withheld under this exemption, at the time of review, would have led to the inhibiting effect described.
58. With regard to the information redacted in the final version provided to the Applicant before full disclosure, the Commissioner considers the variance in the redacted text from the views of the rest of the working group have been overstated, and he does not consider disclosure of this information would lead to the consequences described. The view is clearly offered from a lay perspective and appears to be a relatively inoffensive, aspirational statement.
59. The Commissioner is not persuaded, from the submissions he has received and the content of the information itself, that disclosure of the information, withheld under section 30(b)(i), would result in the harm claimed by the Ministers.
60. The Commissioner does not, therefore, accept the application of the exemption in section 30(b)(i) of FOISA should be upheld in respect of the information being withheld under this exemption.
61. For the avoidance of doubt, the Commissioner would have had the same view if the Ministers had maintained their reliance on this exemption for the material that they subsequently either disclosed or withheld under section 29(1)(a) (see paragraph 9).
62. Given that the Commissioner does not accept the application of the exemption for the information withheld under section 30(b)(i), he is not required to consider the public interest in section 2(1)(b) for that information.
63. As the Ministers have disclosed the Report to the Applicant in full, no action is required.



## **Decision**

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

The Commissioner is satisfied that the information withheld under section 29(1)(a) (Formulation of Scottish Administration policy etc.) is exempt from disclosure under section 29(1)(a) but that, on balance, the public interest favours disclosure of the information.

The Commissioner also finds that the Ministers wrongly withheld information under the exemption in section 30(b)(i) (Prejudice to effective conduct of public affairs).

Given that the Ministers have since provided a full copy of the Report to the Applicant, the Commissioner does not require the Ministers to take any action in respect of these failures in response to the Applicant's application.

## **Appeal**

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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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**16 November 2022**

## Appendix 1: Relevant statutory provisions

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### 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.

...

#### 29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to-

- (a) the formulation or development of government policy;

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (b) would, or would be likely to, inhibit substantially-

- (i) the free and frank provision of advice; or

...

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