



Scottish Information
Commissioner
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Decision Notice 220/2024

Prospectus for independence

Applicant: The Applicant
Authority: Scottish Ministers
Case Ref: 202200809

Summary

The Applicant asked the Authority for the publication timetable for the prospectus for independence and for related information. The Authority refused to disclose the timetable because disclosure would, or would be likely to, otherwise prejudice substantially the effective conduct of public affairs. The Authority also told the Applicant that it would cost more than £600 to provide the related information requested and therefore it was not obliged to provide a response. Following an investigation, the Commissioner found that the Authority had wrongly withheld some information and that its interpretation of the part of the request it refused to comply with on the basis of excessive cost was overly broad. He required the Authority disclose the wrongly withheld information and to reconsider part of the Applicant's request and issue a revised review outcome.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 12(1) (Excessive cost of compliance); 30(c) (Prejudice to effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

Background

1. On 22 May 2022, the Applicant made the following request for information to the Authority:

- 1) "In an essay for The National, the First Minister states "we will shortly begin publishing an updated prospectus on the opportunities that independence can offer Scotland". Please provide the publication timetable for this prospectus"
 - 2) "Please provide any internal correspondence since January 2022 discussing the plans to publish the updated prospectus and any comms handling documents or discussions around the prospectus"
2. The Authority responded on 22 June 2022. The Authority withheld information relevant to part 1 of the request under the exemption in section 29(1)(a) (Formulation of Scottish Administration policy etc.) of FOISA. For part 2 of the request, the Authority stated that the cost of carrying out this work would exceed the limit set in the Fees Regulations, and therefore under section 12 of FOISA it was not required to provide the information requested. The Authority suggested to the Applicant that he may wish to narrow the scope of his request (e.g. by specifying the topic(s) he was most interested in) to bring the cost of complying below £600 and referred him to the Commissioner's guidance on how to do so.
 3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision because:
 - he did not believe the exemption in section 29(1)(a) of FOISA had been applied correctly or with appropriate consideration of the public interest test
 - section 12 of FOISA had been applied as a in the case of the cost exemption simply applied as a "blanket refusal", with no indication that a cost calculation had been undertaken. The Applicant explained that the scope of part 2 of his request was "very narrow", specifying just communications planning and discussions around the timetable of the papers being released, not discussions around the papers' contents.
 4. The Authority notified the Applicant of the outcome of its review on 20 July 2022, concluding that its original decision should be confirmed with modifications for part 1 of the request only. For part 1 of the request, the Authority withdrew its reliance on the exemption in section 29(1)(a) of FOISA and instead withheld the information requested under the exemption in section 30(c) (Prejudice to the effective conduct of public affairs). For part 2 of the request, the Authority maintained that it would exceed £600 to comply with the request and it provided further details of the work that complying with the request would involve.
 5. On the same day, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because:
 - for part 1 of the request, he believed that the exemption in section 30(c) of FOISA did not hold in any meaningful way and that, in any event, the public interest favoured disclosure.
 - for part 2 of the request, he did not agree with the cost calculation and that the Authority had taken "too broad an approach in order to hit the cost exemption".

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

7. On 15 August 2022, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was subsequently 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 Authority was invited to comment on this application, which it did.

Commissioner's analysis and findings

9. The Commissioner has considered all the submissions made to him by the Applicant and the Authority.

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

10. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
11. The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b) 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 the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure.
12. There is no definition of "substantial prejudice" in FOISA, but the Commissioner considers that the harm in question would require to be of real and demonstrable significance. An authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur: therefore, the authority needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
13. As rehearsed earlier, the Authority applied section 30(c) of FOISA to withhold information falling within part 1 of the Applicant's request: that is, the publication timetable (held at the time of the request) for the prospectus "on the opportunities that independence can offer Scotland".

The Authority's submissions on the exemption

14. The Authority stated that the information withheld under this exemption related to the indicative timetable and titles of papers that were in draft form, and therefore did not reflect decisions taken on either titles of papers within the "Building a New Scotland" series or a final timetable for publication.
15. The Authority explained that disclosing an out-of-date draft timetable or title for publications in the "Building a New Scotland" project would negatively affect its ability to effectively communicate with the public to take forward one of its key policies of giving the people of Scotland the information they would need to make an informed choice over their future.
16. The Authority submitted that the draft timetable included tentative dates for publication, which, if released, would provide an inaccurate representation of the final position regarding the number, timing and sequencing of papers within the "Building a New Scotland" series.

The Authority argued that, in publishing indicative deadlines, titles and timings that may not be met for a variety of reasons, external commentators and the wider public could misinterpret the reasons behind potential changes, thereby impacting the overall interpretation and consumption of the content within the series.

17. The Authority stated that while the papers themselves, once agreed upon, were intended for public consumption, an outline timetable for publication at a particular point in time, which was subject to substantial change, was not. The Authority argued that a project of this nature could only be executed successfully if Ministers and officials were able to work from draft timetables or titles, which they are free to make changes to as and when required in a private space, with the knowledge that their previous proposed timings will not be disclosed at any time in the near future.
18. The Authority considered it was important that Ministers and officials have a private space to discuss provisional timings for publication and titles, knowing that these may change for a variety of reasons, without these provisional timings being made public. The Authority noted that a version of the information requested, reflecting final decisions taken, was going to be placed into the public domain in due course.
19. In summary, the Authority concluded that disclosure of the information requested would substantially prejudice its ability to effectively plan and change those plans as circumstances required.

The Applicant's submissions on the exemption

20. The Applicant believed that the exemption did not apply "in any meaningful way".

The Commissioner's view on the exemption

21. The Commissioner has considered the submissions from both parties and the information withheld under section 30(c) of FOISA. He must consider the withheld information with regard to the circumstances at the time of the Authority's review outcome.
22. The Commissioner notes, from the Authority's submissions, that it considers disclosure of the information being withheld under section 30(c) of FOISA would give an inaccurate representation of the final position regarding the number, timing and sequencing of papers within the "Building a New Scotland" series. He has also considered the argument put forward by the Authority for Ministers and officials to have a private space in which to discuss provisional timings and related factors.
23. In the Commissioner's view, the majority of the information withheld under this exemption is information on topics which a reasonable person would expect to be included in the prospectus, and which would be considered by an open, transparent and accountable government in exploring options for Scotland's future in the event of an independence referendum. The Commissioner does not consider that any of this information (relating to the topics to be considered) would come as a "surprise" to anyone as it relates to matters which the people of Scotland would naturally expect to be included.
24. In addition, and without disclosing the content of the information itself, the Commissioner notes that the majority of the information being withheld under section 30(c) of FOISA does not include detailed descriptions or considerations. He is not persuaded, from the submissions he has received and from consideration of the withheld information itself, that disclosure of the majority of the information withheld under section 30(c) would result in the harm claimed by the Authority.

25. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that the disclosure of the majority of this information would otherwise, or would be likely to, prejudice substantially the effective conduct of public affairs. He does not believe that such a conclusion can be reached from the arguments provided for the majority of this information.
26. The Commissioner does not, therefore, accept that the exemption in section 30(c) of FOISA should be upheld in respect of the majority of the information withheld under this exemption.
27. Given that the Commissioner does not accept the application of the exemption for the majority of the information withheld under section 30(c), he is not required to consider the public interest test in section 2(1)(b) of FOISA for that information. As no other exemption has been claimed by the Authority to justify the withholding of that information, the Commissioner requires the Authority to disclose it to the Applicant. He will identify that information to the Authority along with this decision notice.
28. The Commissioner will now turn to the remainder of the information being withheld under section 30(c) of FOISA, which relates to the provisional timetable and dates for the prospectus.
29. For information relating to dates for progressing and publishing the prospectus, it is clear to the Commissioner that the timetable was provisional and subject to change as matters evolved.
30. At the time of the Authority's review outcome (July 2022), these dates were current (albeit provisional), and therefore disclosure of the information would have been likely to give an impression of when each element was likely to be completed. In that respect, the Commissioner appreciates the argument put forward by the Authority that disclosure would prejudice its ability to effectively communicate with the public on this, particularly where the dates had not been confirmed.
31. The Commissioner notes, from the Authority's submissions, that it considers disclosure of this information would negatively affect the Authority's ability to effectively communicate with the public to take forward one of its key policies of providing the people of Scotland with information on their options in the event of an independence referendum.
32. While the Commissioner is of the view that disclosure of this remaining information would be unlikely to prejudice the Authority's ability to publish future papers in the series (as appears to have been claimed by the Authority), he does accept that it would be likely to cause undue speculation and detract the Authority from being able to make changes to the provisional dates, as and when appropriate.
33. As such, the Commissioner is satisfied that section 30(c) of FOISA is engaged for the remaining withheld information, in that disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs, in the manner described by the Authority.
34. As the exemption in section 30(c) has been found to apply to the remaining withheld information, the Commissioner is now required (for this information) to go on to consider the public interest test in section 2(1)(b) of FOISA.

Public interest test - section 30(c)

35. Section 30(c) is subject to the public interest test required by section 2(1)(b) of FOISA. As the Commissioner has found that the exemption in section 30(c) was correctly applied to

some of the withheld information, he is now required to consider whether, in all the circumstances of the case, the public interest in disclosing that remaining withheld information is outweighed by the public interest in maintaining the exemption.

The Authority's submissions on the public interest – section 30(c)

36. The Authority recognised the public interest in release of the information for reasons of openness, transparency and accountability, and also in the planning around the publication of the Building a New Scotland series of papers in particular, given this was a matter of significant political interest and controversy. However, the Authority submitted that the public interest in this information would be met, at least in part, when final decisions have been taken and the papers in the series were published.
37. In the circumstances, the Authority considered that there was a greater public interest in allowing officials a private space within which to communicate as part of the process of exploring and refining the timetable for publishing the papers within the series before reaching a settled view. The Authority submitted that this, in turn, would enable the Authority to effectively and accurately engage and communicate with the public on its proposals for an independent Scotland, without the risk of these proposals being prejudiced by the disclosure of inaccurate information, taken from earlier draft material, which did not reflect the final position.
38. The Authority explained that the “Building a New Scotland” series was a project which was still under development and was a matter of significant political relevance and controversy. The Authority considered that Ministers and officials needed to have a private space to rigorously and candidly explore all options on a range of matters concerned with this project before reaching a settled decision.
39. In the Authority's view, it was in the public interest to enable this work to be approached in this way as it supported a robust process of developing and refining final proposals. The Authority therefore believed that the public interest lay in upholding the exemption.

The Applicant's submissions on the public interest – section 30(c)

40. The Applicant believed that the public interest favoured disclosure of the information withheld by the Authority under section 30(c) of FOISA.

The Commissioner's view on the public interest - section 30(c)

41. The Commissioner has considered carefully the public interest arguments, together with the remaining withheld information in question. He is required to balance the public interest in disclosure of the information requested against the public interest in maintaining the exemption. In the context of FOISA, the public interest should be considered as “something which is of serious concern and benefit to the public”.
42. The Commissioner considers that any change to Scotland's constitution is a matter of significant and considerable public interest to the people of Scotland. In his view, it is reasonable to conclude that the public interest in disclosing information about the planned timetable for the prospectus for independence would be substantial.
43. The Commissioner recognises that there is a significant public interest in transparency and accountability concerning matters related to Scotland's future in the event of a second independence referendum. He accepts that disclosure of this information would allow public scrutiny and assessment of the Authority's plans, particularly the timing, for consideration of the topics to be included in the prospectus and, once agreed, publication of that information.

In the Commissioner's view, this would not only inform public debate, but would also satisfy the public interest in openness, transparency and accountability. To some degree, however, the Commissioner considers this is met by disclosure of the information he has found not to be exempt (as set out above).

44. On the other hand, the Commissioner accepts that there is a significant public interest in the Authority ensuring it can explore these topics without prejudice, and without speculation from the wider public as to when decisions on these matters, for inclusion in the published prospectus, will be taken. In the Commissioner's view, this would only detract the Authority from effectively progressing its discussions and plans on these matters, the dates for which (as he has already noted) were provisional at the material time, and subject to change.
45. As set out above, the Commissioner has already accepted that disclosure of the remaining information being withheld under section 30(c) of FOISA (i.e. relating to the timetable and provisional dates) would otherwise, or be likely to, substantially prejudice the effective conduct of public affairs. Having balanced the public interest arguments for and against disclosure, he is satisfied that, on balance, the public interest in maintaining the exemption in section 30(c) outweighs that in disclosure of the remaining withheld information.
46. The Commissioner therefore concludes that the Authority was entitled to withhold the remaining information under the exemption in section 30(c) of FOISA.
47. The Commissioner would stress that his decision, in this case, has to be based on the circumstances at the time the Authority considered the Applicant's request and requirement for review. He recognises that this may change over time.

Section 12(1) – Excessive cost of compliance

48. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the relevant amount prescribed in the Fees Regulations. This amount is currently £600 (see regulation 5). Consequently, the Commissioner has no power to require the disclosure of information should he find that the cost of responding to a request for that information would exceed this sum.
49. The projected costs a Scottish public authority can consider in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs (whether direct or indirect) it reasonably estimates it is likely to incur in locating, retrieving and providing the information requested, in accordance with Part 1 of FOISA.
50. An authority may not charge for the cost of determining whether it:
 - (i) actually holds the information, or
 - (ii) should provide the information.
51. The maximum hourly rate a Scottish public authority can charge for staff time is £15 per hour.

The Commissioner's view

52. The Authority provided detailed submissions on the searches it undertook in response to the request and on the cost calculation it estimated. Having considered the Authority's submissions, the Commissioner accepts that it would cost the Authority more than £600 to comply with part 2 of the request based on the Authority's interpretation of it.

53. However, having considered the specific terms of part 2 of the request, the Commissioner considers that the Authority interpreted it too broadly. He will therefore not reproduce the Authority's submissions on its searches or its estimated cost calculation in this decision notice.
54. The Commissioner has carefully considered the specific terms of the request, part 2 of which reads:
- “Please provide any internal correspondence since January 2022 discussing the plans to publish the updated prospectus and any comms handling documents or discussions around the prospectus”
55. The Authority explained that it interpreted “discussions around the prospectus” to capture “any information discussing the prospectus in any way”, including the timetable, the content of the prospectus, “or even just stating that it was happening”.
56. The Commissioner's view is that the Authority's interpretation was overly broad. The entire request, both parts 1 and 2, related to the publishing of the updated prospectus. Part 2 of the request had two components:
- (i) for “any internal correspondence since January 2022 discussing the plans to publish the updated prospectus”, and
 - (ii) for “any comms handling documents or discussions around the prospectus.”
57. In his requirement for review, the Applicant stated that part 2 of his request was “very narrow”, specifying just “communications planning and discussions around the timetable of the papers being released, not discussions around the papers' contents”.
58. When part 2 of the request is viewed in the full context of the request and the Applicant's requirement for review, the Commissioner does not consider it was reasonable for the Authority to interpret the latter component of part 2 of the request as broadly as it did.
59. Even if the Commissioner were to accept that part 2 of the request could have been read at initial response stage as seeking “any information discussing the prospectus in any way”, it was not reasonable for the Authority to maintain this interpretation in light of the Applicant's requirement for review.
60. In all the circumstances, particularly in light of the Applicant's requirement for review, the Commissioner considers that the Authority should have interpreted part 2 of the Applicant's request less broadly than it did. Had it done so, it would have been for the Authority to determine whether it still would have cost it more than £600 to provide the information requested falling within the scope of the narrower interpretation of part 2 of the request.
61. Consequently, the Commissioner considers that the Authority has failed to accurately interpret and respond to part 2 of the Applicant's request.
62. The Commissioner therefore finds that the Authority failed to comply with section 1(1) of FOISA. He requires the Authority to reconsider part 2 of the Applicant's request, and to provide the Applicant with a fresh review response in relation to it.
63. If, after reconsidering part 2 of the Applicant's request, the Authority considers that it would cost more than £600 to provide the information requested and therefore it would not be obliged to provide a response, it should provide the Applicant with advice and assistance, in line with its duty under section 15 of FOISA, on where relevant information is most likely to

be so he might narrow the scope of his request to either obtain all of the information he is seeking or at least some of it.

Decision

The Commissioner finds that the Authority 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 the Authority was entitled to withhold certain information under the exemption section 30(c) of FOISA, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA (and, in particular, section 1(1)), by withholding some information under the exemption in section 30(c).

The Commissioner also finds that, in failing to reasonably interpret part 2 of the Applicant's request, the Authority failed to comply with Part 1 of FOISA (and, in particular, section 1(1)).

The Commissioner therefore requires the Authority to:

- disclose to the Applicant the information wrongly withheld under section 30(c) of FOISA
- reconsider part 2 of the Applicant's request and issue a fresh review outcome to the Applicant, in accordance with section 21(4) of FOISA

by 18 November 2024.

Appeal

Should either the Applicant or the Authority 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 Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner
02 October 2024