

Decision Notice 009/2020

Internal communications about FOI Intervention

Applicant: The Applicant

Public authority: The Scottish Ministers

Case Ref: 201900160



Scottish Information
Commissioner

Summary

The Ministers were asked for internal communications relating to an intervention carried out by the Scottish Information Commissioner into their handling of information requests. The Ministers withheld information on the basis that disclosure would prejudice the effective conduct of public affairs.

The Commissioner investigated and found that the Ministers were correct to withhold most of the information. The information wrongly withheld was disclosed to the Applicant during the investigation.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(b) and (c) (Prejudice to the effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 3 August 2018, following dialogue with Scottish Ministers (the Ministers) regarding the framing of these requests (as set out in paragraph 11), the Applicant made a four-part request for information to the Ministers. The requests are set out in full in Appendix 2. This decision focusses on two of these requests, which were for all internal communications held by the Ministers' FOI unit from 1 June 2017 to 20 June 2018, involving Ministers, Special Advisers and communication staff in relation to:
 - the letter, published on 1 June 2017, by CommonSpace and The Ferret, raising concerns of journalists regarding the Scottish Government's FOI policies [request 1] and
 - the Commissioner's intervention into the Scottish Government's handling of FOI requests from 01/06/2017 to 20/06/2018 [request 2]
2. The Ministers responded on 3 September 2018. They supplied information¹ for both requests, but withheld some information on the basis that the exemptions under the following sections applied: 30(b) (Prejudice to effective conduct of public affairs) and 38(1)(a) and (b) (Personal information) of FOISA. The Ministers also applied section 25(1) (Information otherwise accessible) of FOISA, explaining that some of the information within the scope of these requests could be found on both the Ministers' and the Commissioner's websites.
3. On 6 September 2018, the Applicant wrote to the Ministers requesting a review of their decision on the basis that the Ministers had not clearly identified which exemptions applied to the information that had been redacted. He asked the Ministers to review each application of section 30(b) and argued that the public interest favoured disclosure of the information.

¹ <https://www.gov.scot/publications/foi-18-02110/>

4. The Ministers notified the Applicant of the outcome of their review on 22 October 2018. Three additional documents were disclosed to the Applicant subject to redaction of information on the basis that the exemptions under sections 30(c) and 38(1)(b) applied. The Ministers also directed the Applicant to further information which was available on its website which fell within the scope of the requests. The Ministers also reviewed their application of section 30(b). They concluded that, in a number of cases, the exemptions in section 30(b) had been applied incorrectly and disclosed further information. In addition, the Ministers acknowledged that, due to administrative error, some information had been incorrectly withheld; this information was also supplied to the Applicant subject to the redaction of personal data.
5. On 24 January 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner 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 was not satisfied that the Ministers had released all relevant material. He was also dissatisfied that the Ministers had withheld information under section 30(b) and (c); he believed these exemptions had been applied inconsistently and inappropriately. The Applicant had particular concerns about redactions to a briefing document provided to the Deputy First Minister.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
7. On 18 February 2019, 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.
9. On 12 June 2019, the Ministers disclosed more information to the Applicant. This information fell within the scope of both sets of requests - that is, all parts (parts 1-4) of the request of 3 August 2018, as set out in Appendix 2 (below) - and the Ministers said they no longer sought to rely on either of the exemptions in section 30(b) to this information.

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.

Background

11. The Applicant had previously made a series of requests to the Ministers on the subject of the Commissioner's intervention. The Ministers had refused those requests on the grounds of excessive cost (section 12 of FOISA). At the same time, the Ministers advised the Applicant to narrow his request by specifying a business area. As a result of this advice, the Applicant accepted the wording suggested and made this four-part request set out in full in Appendix 2.

12. On 2 August 2018, the Applicant wrote to the Ministers:

“...the best way to ensure that I am able to access all of the information I seek would be to split the two existing requests again, asking for any information held by the FOI unit in relation to the specified topics and separately asking for any communication between ministers SPADs and Comms officials related to the specific topics.”
13. The exact wording of the requests were drafted by the Ministers and accepted by the Applicant on 3 August 2018.
14. The Ministers explained that they also took the view that communications “involving” the Scottish Ministers, special advisers and communications staff would include communications sent to or from individuals in any of their groups (or their private offices). To identify the information held within the scope of these requests, the Ministers explained and evidenced their searches.
15. The Commissioner acknowledges that the wording of the requests creates an artificial division between the Ministers and the FOI unit. The FOI Unit is part of the public authority itself. FOISA relates only to Scottish public authorities – in this case, the Ministers. Whilst the distinction arose in the context of advice and assistance, the Commissioner does not think this distinction has facilitated the dealing with the request. Nonetheless, it was a suggestion that the Applicant agreed to. It is within this context that he has considered the Ministers’ handling of these requests.

Information held

16. The Applicant was not confident, due to the handling of his requests, that the Ministers had located all of the information falling within the scope of the requests.
17. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in this case, more information) is not held.
18. Having considered all the relevant submissions, including details of the searches conducted, the Commissioner accepts that the Ministers have taken adequate and proportionate steps to establish the information they held which fell within the scope of the Applicant’s requests. In reaching this conclusion, the Commissioner has taken into account the evidence supplied to him. The actual searches undertaken by the Ministers to assess the information held were reasonable and proportionate and likely to identify relevant information. Staff involved in searching for the information had experience and knowledge of the subject, reducing the likelihood of searches being faulty or relevant information being overlooked.

Section 30(b)(i) and (ii) - Prejudice to the effective conduct of public affairs

19. Section 30(b)(i) provides that that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice. Section 30(b)(ii) of FOISA provides that information is exempt if its disclosure would, or would be likely to, inhibit substantially the free and frank exchange of views for the purposes of deliberation. Both exemptions are subject to the public interest test in section 2(1)(b) of FOISA.

20. In applying the exemption in section 30(b)(ii), the chief consideration is not whether the information constitutes opinion or views, but whether the disclosure of that information would, or would be likely to, inhibit substantially the free and frank exchange of views. Similarly, for section 30(b)(i), the chief consideration is not whether the information constitutes advice, but whether the disclosure of that information would, or would be likely to, inhibit substantially the provision of advice. For both exemptions, the inhibition in question must be substantial and therefore of real and demonstrable significance.
21. Each request must be considered on a case-by- case basis, taking into account the effect (or likely effect) of disclosure of that particular information on the future exchange of views. The content of the withheld information will require to be considered, taking into account factors such as its nature, subject matter, manner of expression, and also whether the timing of disclosure would have any bearing.
22. As with other exemptions involving a similar test, the Commissioner expects authorities to demonstrate or explain why there is a real risk or likelihood that actual inhibition will occur at some time in the near future, not simply a remote or hypothetical possibility.

The Applicant's submissions

23. The Applicant was dissatisfied that the Ministers withheld information under section 30(b). He believed the exemptions were applied inconsistently and inappropriately. Specifically, he suggested that the redactions made to the briefing to the Deputy First Minister were made simply on the basis that the information was politically embarrassing.

The Ministers' submissions

24. The Ministers submitted that information withheld under section 30(b) of FOISA applied to three principal types of information:
 - information related to the preparation of media lines and a handling plan
 - information about potential questions that might be asked in a Parliamentary debate
 - information about the handling of individual requests.

Preparation of media lines and handling plans

25. The Ministers commented that the time period of these requests included the period around publication of the Commissioner's Intervention report. Accordingly, the information within scope included discussions of the media handling for the publication of the report.
26. The Ministers explained that, in preparing media lines and handling plans, officials, special advisers and Ministers will test different approaches. Communications specialists will be involved in considering how those approaches might be received, and whether they will have a positive or negative outcome. They require input from the policy leads to ensure that the proposed lines and handling plans accurately reflect the Scottish Government's position and do not inadvertently mislead or misstate the position. Ministers and special advisers will also consider how lines and handling plans are likely to be received.
27. The Ministers said that production of lines and handling plans was "an iterative process": early ideas may be tested, refined, revised and reworked, and the final product may differ substantially from the starting point.
28. The Ministers submitted that the section 30(b) exemptions recognise the need for Ministers and officials to have a private space to develop, discuss, test and revise lines and handling

plans before arriving at a final position, designed to be communicated publicly. However, the Ministers argued that the process to arrive at a final position is not a public process. The process involves the free and frank exchange of views, as well as the frank provision of advice, to arrive at a final agreed position. If the means by which such a position was arrived at were disclosed, the Ministers believed that those involved would be substantially inhibited from giving their views freely. The Ministers' ability to test robustly proposed positions before using them publicly would, the Ministers submitted, be compromised substantially if every preliminary thought that had been recorded had to be disclosed.

Potential issues that might be raised in Parliamentary debate

29. These documents related to the Parliamentary statement given by the then Minister for Parliamentary Business on 13 June 2018 following the publication of the Commissioner's Intervention Report.
30. The Ministers explained that when a Minister is to make a Parliamentary statement or participate in a debate, he/she receives extensive briefing from the policy officials who lead on the subject-matter of the statement or debate. Typically, the officials will seek to anticipate questions or issues that might be raised, and ensure that the Minister is appropriately briefed to respond. This process too is iterative, with potential questions and related responses being tested and refined. The Ministers believed that the section 30(b) exemption applied for similar reasons to those given for the preparation of media lines and handling plans.
31. The Ministers explained that much of the briefing is intended to rebut arguments made by other MSPs. However, as the arguments are not known in advance, much of the information is speculative. If deployed, it will enter the public domain – but, until deployed, it remains the advice of officials to their Ministers, given freely and frankly. If such preparatory material were routinely disclosed, the Ministers believed this would substantially inhibit the production of briefing in a free and frank manner, with the result that Ministers would be less able to participate fully in Parliamentary proceedings.

Information about the handling of individual FOI requests

32. Each document here was a briefing given to a Minister or a special adviser before an interview with the Commissioner as part of the intervention process. (The Commissioner had given notice that he wished to discuss their involvement in the handling of certain individual FOI cases, and the FOI Unit accordingly provided briefing to refresh the interviewees' memories as to the cases in question, some of which had been dealt with some time before.)
33. The Ministers said that a distinction could be drawn between the briefing prepared for the Deputy First Minister and the other briefings. The Ministers commented on this because the Applicant highlighted this in his application. The Deputy First Minister's interview was the first to take place, and a relatively short period had elapsed between officials agreeing the date and time of the interview with the Commissioner and it taking place. Accordingly, the production of the briefing was substantially expedited. Following reflection and further input from senior officials, it was decided that a different approach would be taken to the other briefings.
34. Accordingly, this briefing differs in style and content from the other briefings. It contains a candid assessment from the FOI Unit of why the individual cases were likely to be of interest to the Commissioner. The remaining briefings do not enter into anything like the same level or analysis – and to the extent that analysis is provided, it is much less frank. The Ministers therefore submitted that there was a substantive reason for appearing to treat the briefings differently: the information withheld in this briefing (under the heading "FOI Unit assessment

of potential matters for discussion”) was sufficiently free and frank to engage the section 30(b)(i) exemption. By contrast, the apparently equivalent section of the other briefings (“Potential matters for discussion”) lacks the necessary qualities to engage the exemption – and so, on review, the Ministers did not seek to withhold that information.

35. The Ministers submitted that the information withheld in the remaining documents which fell within this category was slightly different. Those briefings included a factual summary of the individual FOI cases proposed for discussion, which was compiled from case files. In some cases, the briefings quoted passages of advice that had been given, or exchanges of views that took place, in the course of handling the individual cases. The Ministers had sought to withhold this information only where they considered that the information withheld engages the section 30(b) exemptions and where the public interest test favours withholding it. Accordingly, a discriminating approach was taken, and the Ministers did not attempt to withhold all such quotations. The Ministers said that the Applicant appears to acknowledge this in his application, but said they did not agree with the Applicant’s characterisation of the redactions as being inconsistent and inappropriate: rather, they believed their approach would have been far more open to legitimate criticism had they simply withheld all of the quoted advice or exchanges of views.
36. The Ministers rejected the suggestion that, having disclosed some advice or exchanges of views, they were necessarily bound to disclose all of it. In each of the cases where information was withheld, it was the Ministers’ view that the advice or exchanges of view were free and frank, and that if they were to be disclosed it would substantially inhibit officials, particularly those in the FOI Unit, from giving those candid views and advice in future.

The Commissioner’s conclusions

37. The Commissioner has considered all the submissions made by the Ministers and the Applicant, along with the withheld information under consideration. The Commissioner accepts that, in the circumstances of this case, officials required a private space to discuss matters freely and frankly, without the concern that such comments would be made public. The Commissioner accepts that there was a need for Ministers and officials to have a private space to develop, discuss, test and revise lines and handling plans before arriving at a final position, designed to be communicated publicly. Such a process involved the free and frank exchange of views. Disclosure of these views (at the time of the request or review) would, for the reasons given by the Ministers, substantially inhibit those involved from giving their views freely.
38. Similarly, the Commissioner accepts that officials will seek to anticipate questions or issues that might be raised to ensure that a Minister is appropriately briefed to respond to questions. In this case, the Commissioner is satisfied that disclosure the information would have substantially inhibited the production of briefing in that way, with the result that Ministers would be less able to participate fully in Parliamentary proceedings.
39. Although the request was made after the publication of his report, the Commissioner’s intervention was ongoing at the time of the request and review and, indeed, it still is. In all the circumstances of the case, the Commissioner accepts that disclosure of the withheld information would be likely to result in substantial inhibition to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation, as argued by the Ministers. As such, he is satisfied that most of the information under consideration here is exempt from disclosure in terms of the exemptions in section 30(b) of FOISA.

Public interest test - section 30(b)

40. The "public interest" is not defined in FOISA, but has been described as "something which is of serious concern and benefit to the public", not merely something of individual interest. The public interest does not mean "of interest to the public" but "in the interest of the public", i.e. disclosure must serve the interests of the public.
41. The Ministers acknowledged the public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate, particularly in relation to a high profile matter like the Commissioner's intervention.
42. However, they also submitted that it was in the public interest that the Ministers were properly prepared to respond to the intervention report when it was published, and that this included preparing media lines and a handling plan to respond to it. In order for them to be properly prepared, it was necessary that they had full and candid advice from officials, and that free and frank discussions could take place among officials, Ministers and special advisers on handling. Were information of this sort to be disclosed, the Ministers considered it would substantially affect the willingness of all concerned to take part in such discussions, with the result that the Ministers' response would have been less fully tested and less robust.
43. Similarly, the Ministers submitted that it was also in the public interest that Ministers were properly prepared to respond to matters that might arise in the course of a Parliamentary statement on the report. In order to be properly prepared, it was necessary that they had full and candid advice from officials, and that free and frank discussions could take place among officials, Ministers and special advisers about the content of the briefing. Were information of this sort to be disclosed, the Ministers submitted that it would substantially impact the willingness of all concerned to take part in such discussions, with the result that the Minister would have been less prepared to respond to questions and issues raised in response to the statement.
44. The Ministers believed there was limited public interest in disclosing snippets of advice and exchanges of view on the handling of individual FOI requests from several years previously. The information fell within the scope of these requests only because that information had been compiled from a variety of individual case files in order to allow interviewees to refresh their memories so that they might participate in their interviews with the Commissioner effectively and constructively. While the information in question "tangentially relates to the Commissioner's intervention", the Ministers submitted that it does not, of itself, directly inform public debate on that topic. Instead, it relates to historic FOI practice. In their assessment, the public interest in disclosure of that information was therefore weak.
45. In contrast, the Ministers considered that there was a strong public interest in ensuring that robust advice and exchanges of views could be given in relation to individual FOI cases, while disclosing that advice would make those involved less likely to record their views in future. They also referred to the wider public interest in ensuring that interviewees were properly prepared to participate in interviews with the Commissioner, to help make the intervention as a whole as effective as possible.
46. The Applicant argued against the Ministers' view for the need for this material to be withheld. He also believed there was a clear public interest in greater disclosure, given the nature of this case and its high profile. He expressed concern at the Ministers' ability to apply the public interest test properly, given what he described as the obvious political risks of full disclosure and the continued role of Ministers and Special Advisers in handling FOI requests.

The Commissioner's conclusions

47. The Commissioner has considered the public interest arguments put forward by both the Ministers and the Applicant. The Commissioner acknowledges strength in the Applicant's argument that there is a public interest in knowing what took place between government officials and those persons the Applicant describes in respect of the Commissioner's intervention. Disclosure would reveal the type of advice sought and provided and the views expressed. Transparency would enable the public to understand more about the Commissioner's intervention and also about how the Ministers responded and participated in the intervention.
48. The decision on whether it is in the public interest to disclose advice/views must be assessed in relation to the specific circumstances of the case on each occasion, and at the time of the review (at the latest). In this case, on balance, the Commissioner accepts that the public interest in maintaining the exemption outweighs the public interest in disclosure. He accepts that the prospect of disclosing such advice/views at the time of the Applicant's request (or review) was likely to have been detrimental to informed decision making, and he agrees with the Ministers that in the circumstances the public interest lay in avoiding such an outcome. In reaching this conclusion, the Commissioner has taken into account of the extent of the information related to the intervention which was in the public domain at the time of this request.
49. On balance, therefore, the Commissioner finds that the public interest in disclosing the withheld information was outweighed by that in maintaining the exemptions in section 30(b) of FOISA. Consequently, he is satisfied that the Ministers were correct in withholding the information under this exemption.
50. However, the Commissioner must recognise that during his investigation the Ministers disclosed information to the Applicant that was originally withheld under these exemptions. In the absence of any detailed explanation of why the information was exempt at time of the request but not at the date when subsequently disclosed, the Commissioner finds that the Ministers failed to comply with Part 1 of FOISA by initially withholding this information under section 30(b) of FOISA.

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

51. 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". 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 be caused to the conduct of public affairs by release of the information, and how that harm would be expected to follow from release.
52. This exemption 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 would require to be of real and demonstrable significance. The authority must also 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 time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.

53. It is important for public authorities to treat each request for information on a case by case basis. Release of information in one case should not be taken to imply that communications of a particular type will be routinely released in future. The circumstances of each case, including the content of the specific information under consideration, must be taken into consideration and (where required) the public interest in each case assessed on its own merits.

Submissions from the Applicant

54. As noted above, the Applicant argued that the exemptions applied by the Ministers had been applied inappropriately. He stressed that there was a clear public interest in disclosure of more of the information, given the nature of this case and its high profile.

Submissions from the Ministers

55. The Ministers applied this exemption to two paragraphs within one document (a draft of the intervention report) and to another document in its entirety (draft interview notes). Both documents fell within the terms of request 2. The Ministers considered that disclosure would be likely to prejudice substantially the effective conduct of public affairs (here, the exercise of the Commissioner's statutory powers of assessment under section 43(3) of FOISA) because it would lead to unwarranted focus on changes made to the report (changes made by the Commissioner without reference to the Scottish Government) shortly before the final version was published. Therefore, disclosure "would be likely to undermine the credibility and authority of the final, published version of the report and affect the Commissioner's ability to produce intervention reports on such sensitive or controversial matters in future."
56. The Ministers suggested that, to operate effectively, it is important for an independent regulator, such as the Commissioner, to have the private space to explore fully the issues in question, and to seek the Scottish Government's comments in relation to the factual accuracy of the report, without these comments being disclosed subsequently via a request. The Ministers believed that disclosure would significantly harm the intervention process by placing in the public domain information which the Commissioner considered should not be included in the final version of the intervention report as this information was inaccurate and therefore would be misleading.
57. The Ministers explained that the exemption under section 30(c) applied to some of the information requested that is contained in draft interview notes. The Ministers submitted that disclosure of this information would be likely to prejudice substantially the effective conduct of public affairs (i.e. the exercise of the Commissioner's statutory powers of assessment under section 43(3) of FOISA).
58. While the Commissioner has formal enforcement powers, the success of interventions depends, to a certain extent, on public authorities and their staff working voluntarily with the Commissioner to improve practice. The Ministers said that they consider that Scottish Government Ministers and officials would be much more reticent in future about speaking to the Commissioner or his staff if drafts of those interviews (which they had not had an opportunity to comment on) were to be disclosed.
59. Releasing the content of the draft interview notes would make it hard to engage officials in any future voluntary interview knowing that their personal input, views, criticism, etc. were potentially going to be subjected to public scrutiny without the opportunity to fact check the

accuracy of the notes recorded. They would also be reluctant to provide their views as fully and frankly, either in writing or at meetings if they believe that their views were likely to be disregarded through the publication. The Ministers also submitted that it is important to have open and candid exchanges which set out the current position honestly to ensure the intervention is effective and to ensure the final report is accurate.

The Commissioner's conclusions

60. In reaching a finding on this matter, the Commissioner has considered the submissions put forward to him by both the Ministers and the Applicant. The Commissioner accepts that the Ministers' submissions have demonstrated the degree of harm required to meet section 30(c) of FOISA.
61. The Commissioner recognises that disclosure would significantly harm the intervention process, by placing in the public domain information which he considered only a matter of weeks before the Applicant made his request should not be included in the final version of the intervention report as this information was potentially inaccurate and therefore misleading. The Ministers are correct to highlight that regulatory functions (like the intervention) do require, to a certain extent, public authorities and their staff to working voluntarily with the Commissioner. He accepts the Ministers' view that such a process often involves the sharing of drafts for fact checking or comment, etc. and those involved would be more reticent in future about speaking were unchecked information to be disclosed.
62. Given that the Commissioner is satisfied that the section 30(c) exemption applies, he is required to go on to consider the public interest.

The public interest test - section 30(c)

63. As mentioned above, the exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. The Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.
64. The Ministers recognised a public interest in transparency, particularly in the work that the Commissioner carries out as the regulator of FOI in Scotland, in evidencing that the intervention was carried out objectively and independently, and in understanding fully the processes used by the Commissioner during the intervention. The Ministers suggested that this public interest was met, at least in part, with publication of the final report². In addition to the final report, they were also aware, at the time of responding to the review, that they would shortly be publishing their action plan in response to the report (this was published on 8 November 2018), as well as publishing subsequent quarterly updates against the action plan, and that all of these publications would contribute to meeting the public interest in understanding the intervention work.
65. The Ministers consider that there is a greater public interest in allowing the Commissioner to check facts before finalising such a report without that part of the process necessarily being put into the public domain, and in allowing the Commissioner to work on drafts in a manner which allows him to explore fully the issues in question – and to ensure that the final version is accurate.

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<http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>

66. Similarly, in relation to the interview notes, the Ministers submitted there was a greater public interest in allowing the Commissioner to check that his notes of interviews were accurate before finalising any report without that part of the process necessarily being put into the public domain, and in allowing the Commissioner to work with public authorities, without using very expensive and lengthy formal measures, to improve FOI practice. Again, the Ministers believed there was a greater public interest in ensuring that the Commissioner can fulfil his statutory duties effectively and that future interventions are not prejudiced. The Ministers highlighted that the public interest was, to a large extent, served by the publication of the final versions of the interview notes³ and by publishing the report⁴ itself.
67. In general, the Ministers recognised that there is a public interest in transparency, particularly in the work that the Commissioner carries out as the regulator of FOI in Scotland, in evidencing that the intervention was carried out objectively and independently, and in understanding fully the processes used by the Commissioner during the intervention.

The Commissioner's conclusions

68. The Commissioner accepts there is a general public interest in ensuring transparency and accountability, particularly with respect to the Commissioner's intervention with the Scottish Government.
69. However, the public interest in the disclosure of the information must be balanced against the public interest in withholding the information. The Commissioner has accepted that disclosure would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs, because the information could dissuade officials from participating fully. That would not be in the public interest. Although there is a public interest in the disclosure of the information, the Commissioner does not consider it strong enough to outweigh the public interest in maintaining the exemption. Furthermore, he recognises that the public interest has been served to large extent by the publication of the final report, interview notes and related documentation. On balance, therefore, the Commissioner is of the view that the public interest in withholding the information outweighs the public interest in disclosing it.
70. The Commissioner therefore finds that the Ministers were entitled to withhold the information under section 30(c) of FOISA.

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<http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>

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<http://www.itspublicknowledge.info/home/AboutSIC/WhatWeDo/Intervention201702016ScottishGovernment.aspx>

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.

The Ministers were entitled to withhold some information under the exemptions in sections 30(b) and (c) of FOISA, but failed to comply with Part 1 in initially withholding some information which was subsequently disclosed to the Applicant during the investigation. This was a breach of section 1(1) of FOISA.

As this information was disclosed to the Applicant during the investigation, the Commissioner does not require any action.

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.

Margaret Keyse
Head of Enforcement

23 January 2020

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-

...

- (b) would, or would be likely to, inhibit substantially-
- (i) the free and frank provision of advice; or
 - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

Appendix 2

1. All internal communications held by the FOI unit involving Scottish Ministers, Special Advisers and communication staff in relation to the letter, published 1/6/17 by CommonSpace and The Ferret and widely covered both in the media and parliament, raising concerns of journalists regarding the Scottish Government's FOI policies. The time frame for this request is 01/06/2017 to 20/06/2018.
2. All internal communications held by the FOI unit involving Scottish Ministers, Special Advisers and communication staff in relation to the [Commissioner's] intervention into the Scottish Government's handling of FOI requests, announced in November 2017 and for which the final report was published on 13/6/18. The time frame for this request is 01/06/2017 to 20/06/2018.
3. All internal communications between Special Advisers, Communications staff and Ministers in relation to the letter, published 1/6/17 by CommonSpace and The Ferret and widely covered both in the media and parliament, raising concerns of journalists regarding the Scottish Government's FOI policies. The time frame for this request is 01/06/2017 to 20/06/2018.
4. All internal communications between Special Advisers, Communications staff and Ministers in relation to the [Commissioner's] intervention into the Scottish Government's handling of FOI requests, announced in November 2017 and for which the final report was published on 13/6/18. The time frame for this request is 01/06/2017 to 20/06/2018.

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