

Decision Notice 015/2021

Social Security Programme Gateway Reviews and Agency Gateway Review Health Check

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 201901706



Scottish Information
Commissioner

Summary

The Ministers were asked for the information in specified Social Security Programme Gateway Reviews and an Agency Gateway Review Healthcheck.

The Ministers disclosed some information, withholding the remainder under various exemptions in FOISA.

During the Commissioner's investigation, the Ministers changed their position and disclosed further information. While accepting that the Ministers had, by the end of the investigation, correctly withheld some information, the Commissioner found the Ministers had wrongly withheld other information (which he required to be disclosed, where it had not been already).

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 28(1) (Relations within the United Kingdom); 29(1)(a) (Formulation of Scottish Administration policy etc.); 30(b) and (c) (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

1. On 8 January 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was that in the three Social Security Programme Gateway 0 (Strategic Assessment) Reviews dated September 2015, March 2016 and November 2017, and the Agency Gateway Review Healthcheck dated May 2018.
2. The Ministers responded on 1 February 2019, refusing to provide the information requested as they considered it to be exempt from disclosure under the following exemptions in FOISA – section 28(1) (Relations within the United Kingdom); section 29(1)(a) (Formulation of Scottish Administration policy etc.); section 30(b) and (c) (Prejudice to effective conduct of public affairs); section 33(1)(b) (Commercial interests and the economy) and section 38(1)(b) (Personal information). The Ministers explained why they considered these exemptions applied, taking account of the public interest where required.
3. On 1 February 2019, the Applicant wrote to the Ministers, requesting a review of their decision as, with the exception of personal data withheld under section 38(1)(b) of FOISA, he disagreed with the exemptions applied. He provided reasons in support of his position.
4. The Ministers notified the Applicant of the outcome of their review on 12 March 2019 upholding their original decision with modification. The Ministers disclosed redacted copies of the documents requested, withholding the remaining information, variously, under the exemptions in sections 28(1), 29(1)(a), 30(b) and 38(1)(b) of FOISA. The Ministers again explained why they considered these exemptions applied, taking account of the public interest where required.
5. On 10 September 2019, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review. While he accepted the Ministers' decision to withhold personal data

under section 38(1)(b), he did not accept that the remaining exemptions had been properly applied.

Investigation

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 2 October 2019, the Ministers were notified in writing that the Applicant had made a valid application and 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 focused on the Ministers' justification for withholding the remaining information under the exemptions in sections 28(1), 29(1)(a) and 30(b) of FOISA, including consideration of the public interest test.
9. During the investigation, the Ministers changed their position in relation to the exemptions claimed and, on 5 December 2019, disclosed further information to the Applicant, previously withheld (variously) under the exemptions in sections 28(1), 29(1)(a) and 30(b). For the remaining withheld information, the Ministers withdrew reliance on the exemptions in sections 29(1)(a) and 30(b)(ii), now considering this to be exempt (variously) under the exemptions in sections 28(1), 30(b)(i) and 30(c) (in addition to personal data withheld under section 38(1)(b)).
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.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has 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

13. By way of background, the Ministers explained that the Social Security Programme (SSP) within the Scottish Government had been working closely with the Department of Work and Pensions (DWP) to enable the safe, secure transition of benefits devolved to Scotland following the Smith Commission. They submitted that the creation of a new social security system in Scotland was a huge and complex undertaking, and this ongoing programme of work was being undertaken in a highly sensitive political environment. The Ministers stated that Social Security Scotland was the most significant new public service to be created in Scotland since devolution.

The Ministers' change of position during the investigation

14. As explained above, during the investigation, the Ministers provided submissions to the effect that some information, originally withheld, could now be disclosed. This information had been withheld at review stage under (variously) the exemptions in sections 28(1), 29(1)(a) and 30(b) of FOISA. The Ministers disclosed this information to the Applicant on 5 December 2019.
15. The Ministers submitted that, in disclosing this further information, they wished to withhold the remainder under (variously) the exemptions in sections 28(1), 30(b)(i) and 30(c) (in addition to personal data withheld under section 38(1)(b) of FOISA). The Ministers also confirmed they were no longer seeking to rely on the exemptions in sections 29(1)(a) and 30(b)(ii) to withhold any information.
16. The Ministers provided no submissions, however, explaining why this information, now disclosed, was correctly withheld at the time they dealt with the request or the requirement for review, so the Commissioner can only conclude that the Ministers were not entitled to withhold that information at that time, and therefore breached section 1(1) of FOISA in doing so.
17. The Commissioner will now consider whether or not the Ministers were entitled to rely on any exemptions claimed to withhold the remaining withheld information. Given that the Applicant confirmed, in his application, that he was raising no dissatisfaction with any personal data withheld under section 38(1)(b), this matter has not been included in the Commissioner's investigation.

Section 28(1) – Formulation of Scottish Administration policy etc.

18. Section 28(1) of FOISA exempts information if its disclosure would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration. The Scottish Administration and the Government of the United Kingdom both fall within the definition of "administration in the United Kingdom" in section 28(2) 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 relations between administrations by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
19. For section 28(1) to apply, the harm resulting from disclosure must be at the level of substantial prejudice. There is no definition of substantial prejudice in FOISA, but the Commissioner's view is that in order to claim this exemption an authority must be able to satisfy him that the damage caused, or likely to be caused, by disclosing the information would be both real and significant, as opposed to hypothetical or marginal. For the harm to be likely, there would require to be at least a significant probability of it occurring, in the near or foreseeable future and not at some distant time.
20. In this case, the Ministers relied on section 28(1) to withhold some information in the Gateway Review dated March 2016.

The Applicant's submissions

21. In both his application and his submissions to the Commissioner, the Applicant accepted some information may relate to Westminster but questioned the Scottish Government's genuine desire to maintain good relations with the UK Government on social security, given

its open criticism of the UK Government on difficult issues. He argued that the public interest lay in disclosure of relevant information about Scottish and UK Government relations in the context of the SSP and the Agency (the biggest process of devolution in a generation), particularly if these relations indicated risk to the process or showed they were contributing to its success.

The Ministers' submissions

22. In their submissions to the Commissioner, the Ministers claimed that disclosure would prejudice their relationship with the DWP/HM Treasury (HMT). Acknowledging that the information in question was not directly provided by the UK Government, the Ministers argued that it contained references to Scottish Government estimates for implementing social security, based on information received from the DWP, along with candid comments on the ongoing working relationship between these organisations.
23. In the Ministers' view, communication between the Scottish Government and the DWP must remain clear and uninhibited to allow discussion of issues and identification of a suitable way to deliver the SSP. They submitted that disclosure of the withheld information would substantially prejudice such collaboration, and inhibit the likelihood of ensuring that the correct, and working, systems were put in place for its delivery.
24. The Ministers submitted that certain information concerned Scottish Government estimates of implementation costs beyond the amounts allocated by HMT, which were not in the public domain. They argued that the only official public estimate was the figure in the Financial Memorandum, and a revised figure was to be announced as part of the Scottish Budget in early 2020.
25. The Ministers took the view that, as the DWP had the required knowledge to help develop a considered, feasible plan to establish the SSP for Scotland, an open, collaborative relationship must be maintained, to help understand the necessary processes and workstreams for its delivery. In the circumstances, disclosure would substantially prejudice their ability to engage with the DWP on this work. The Ministers believed this particular information gave the impression of a difference in thinking and a lack of joined-up approach between the two UK Departments (the DWP and HMT). As the information related to a preliminary estimate, the Ministers believed its disclosure would be seen as unhelpful by the DWP/HMT and would cause ill-will.
26. The Ministers submitted that the DWP was a key delivery partner for the SSP, given that the creation of the Scottish social security system required phased extrication of elements from the UK system. Ministers were currently in discussion with the DWP about data provision, which was fundamental to delivering aspects of the Scottish Child Payment. In the Ministers' view, loss of the DWP's goodwill in providing this essential data would cause substantial prejudice to the SSP's delivery.
27. Referring to some information, which referenced the Scottish Government's official opinion of this relationship at a point in time, the Ministers argued that disclosure of such candid comments would substantially prejudice its working relationship with the DWP, which must remain open to enable collaborative work on issues of mutual concern.

The Commissioner's views on section 28(1)

28. The Commissioner has carefully considered the submissions from both parties, along with the withheld information itself.

29. In relation to the information concerning estimated implementation costs, the Commissioner acknowledges that disclosure of the actual estimates might prejudice the Scottish Government's relationship with the DWP. He notes, however, that a more recent revised estimate cost was disclosed in the subsequent Gateway Review (dated November 2017). Given this, the Commissioner fails to see how disclosure of information which has been superseded would lead to the harm claimed by the Ministers.
30. For the information referencing the Scottish Government's relationship with the DWP, the Commissioner notes that the information itself appears capable of disclosure without resulting in the prejudice claimed by the Ministers.
31. In conclusion, the Commissioner finds that the Ministers were not entitled to withhold this information under section 28(1) of FOISA. Given this finding, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.
32. As the Ministers are also relying on section 30(b)(i) to withhold this information, the Commissioner will go on to consider the application of this exemption to information in both the Gateway Review of March 2016 and the other documents in which it was relied on.

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

33. 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.
34. In this case, the Ministers relied on section 30(b)(i) to withhold some information in all four documents.

The Applicant's submissions

35. In both his application and his submissions to the Commissioner, the Applicant submitted these Reviews, which reviewed past activity and made recommendations on future activity, would, due to their nature and age, likely have reduced in sensitivity. As these Reviews fully and regularly considered the Programme, he questioned that they referred to the granular process of exploring and refining a position which had not already been taken, the place for these decisions being in the development, as opposed to the review, stages.
36. The Applicant disagreed that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. In his view, not only had that advice been given, received (and accepted or dispensed with), it had aged as a result of the information in these Reviews. Consequently, he believed, it will have led to policy decisions which have informed changes to the Programme, with details made public, and so may have reduced the sensitivity of some or all of the information.
37. The Applicant argued that contributors, authors and external stakeholders are required to provide advice in their professional roles, and were they to feel inhibited from doing so, this questioned confidence in their evidence-base being secure.
38. The Applicant highlighted the age of the information, pointing out that the most recent report was over 18 months old. He argued that, with the passage of time, these reports had been superseded by Reviews which would likely have detailed the actions taken to accept or dismiss the advice in the reports under consideration here, and how the corresponding

issues had been managed. As a result, he believed the information would have reduced in sensitivity.

The Ministers' submissions

39. In their submissions to the Commissioner, the Ministers explained that, in general, a Gateway Review is commissioned to provide the Senior Responsible Owner (SRO) with unvarnished advice on the progress and status of the Programme. The Gateway Review, in its entirety, is advice provided to the Programme's SRO.
40. In forming the advice and drafting the reports, the Ministers submitted, the review panel conducted a series of interviews with officials to gather candid views of the current situation and the work undertaken by the SSP. The reports were compiled on the basis of being "confidential to the SRO and their representative/s" as stated in the reports themselves. On this basis, interviewees provided honest opinions, and this exchange of views was then analysed and used to form the advice and recommendations given to the SRO.
41. The Ministers argued that disclosure of the means of arriving at such a position would substantially inhibit all involved from freely giving their advice and views. They believed disclosure, to those without sufficient knowledge of the SSP to understand it in context, would likely present a negative view of the SSP and the way it was managed. The Ministers submitted that those providing views would not have expected them to be made public.
42. In the Ministers' view, disclosure would have greatly suppressed the freedom with which opinions or options were given during the interview process and this, in turn, would have significantly impacted on the quality of the advice provided in the Reviews. Without candid views, the Ministers submitted, the review panel would not be able to form an accurate and robust view of the SSP on which to base their advice, and that advice would not reflect the current situation which, in turn, would impact on the overall effectiveness of the SSP.
43. Furthermore, the Ministers believed disclosure would significantly inhibit those involved from providing as robust views in future. This, in turn, would significantly inhibit the ability of Ministers and officials - who must be able to develop a considered and feasible plan to establish the SSP - to consider issues, request/respond to advice, or develop thinking or future policy with regard to emerging situations. The Ministers argued that it was imperative to the successful delivery of the SSP to gather honest views during ongoing policy formulation, from those directly involved with delivery, and to reflect those views in the candid advice provided to the SRO by the review panel.
44. The Ministers submitted that officials require a private space within which to provide advice to, or exchange views with, Ministers and other officials before reaching a settled public view. Disclosure, they believed, would substantially inhibit the provision of such advice in the future, particularly as discussions were still ongoing and related to sensitive issues, with further views requiring to be sought and scrutinised as delivery of the SSP progressed.
45. In the Ministers' opinion, disclosure, which could paint an adverse picture (either currently or previously), would lead to officials being more guarded in future. This, they argued, would result in a chilling effect on any future comments/views disclosed to the review panel, and might lead to officials understating or setting aside legitimate and important concerns about the progress and management of social security provision in Scotland. This, in turn, would impact on the overall effectiveness of the Programme.

The Commissioner's views on section 30(b)(i)

46. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
47. In assessing whether the exemption in section 30(b)(i) applies, the Commissioner has taken account of a number of factors, including the timing of the request. He must make his decision based on the Ministers' position at the time they issued their review outcome.
48. The Commissioner considers the passage of time to be a factor for much of the withheld information, particularly with the Reviews having been carried out, in succession, on an almost annual basis. The Commissioner notes that a further Healthcheck Review (not within the scope of this request) had taken place in February 2019, before the review response of 12 March 2019.
49. The Commissioner notes that each Review covers the position at the material time and the progress/changes made since the preceding Review. It is, he believes, therefore inevitable that some early issues have evolved through the passage of time, and some areas that were a concern in earlier Reviews have either been overcome (in later Reviews), or changes have taken place resulting in these earlier concerns no longer being relevant. This, in the Commissioner's view, reduces the prejudice to the effective conduct of public affairs, as claimed by the Ministers.
50. While the Commissioner acknowledges the importance of being able to gather the candid views of individuals, he is not convinced that the disclosure of the majority of the information would prevent such views from being provided/obtained in future, particularly given the age of the material and the fact that many of the issues have evolved over time.
51. While welcoming the fact that the Ministers have already disclosed some information, the Commissioner is concerned to note that the Ministers appear to be seeking to withhold any information that might have given cause for concern, even where such information was clearly no longer of concern at the time they dealt with the Applicant's request for review, given the evolving progress of the SSP. In the Commissioner's view, any major new initiative, particularly one as significant of this, is bound to encounter some concerns, and the Reviews are evidence-based snapshots of the status of the SSP at a given point in time. They highlight both positives and negatives, and make recommendations for improvement and best practice in relation to areas of concern, much of which is now well out of date.
52. The Commissioner is therefore not persuaded, from the submissions he has received, that disclosure of the majority of the information withheld under section 30(b)(i) would result in the harm claimed by the Ministers.
53. In the absence of any submissions persuading him otherwise, the Commissioner does not accept that disclosure of this information would, or would be likely to, inhibit substantially the free and frank provision of advice. He does not believe such a conclusion can be reached on the basis of the arguments provided.
54. The Commissioner does not, therefore, accept that the exemption in section 30(b)(i) of FOISA should be upheld in respect of the majority of the information withheld under this exemption.
55. Given that the Commissioner does not accept the application of the exemption for the majority of 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.

56. As no further exemption has been claimed to justify the withholding of that information, the Commissioner requires the Ministers to disclose it to the Applicant.
57. The Ministers will now go on to consider the public interest in disclosure of the remaining information withheld under section 30(b)(i).

Public interest test – section 30(b)(i)

58. Having accepted that the exemption in section 30(b)(i) applies to the remainder of the information withheld from the Applicant, the Commissioner is required to consider the public interest test in regulation 2(1)(b) of FOISA. He 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.

The Applicant's submissions on the public interest

59. In both his application and his submissions to the Commissioner, the Applicant referred to a report¹ by Audit Scotland “Social security: Implementing the devolved powers”, submitting that the Ministers would have been aware of its content, and that the published information therein would be in the public interest. In the Applicant’s view, the advice concerning the SSP’s delivery underpinned Audit Scotland’s determinations, key messages and recommendations. As the Reviews elaborated on the work undertaken to reach the point referred to in Audit Scotland’s report, the Applicant believed the public interest lay in disclosure of the information, to allow adjudication and debate on how Audit Scotland came to its conclusions.
60. With regard to the age of the Reviews and the passage of time, the Applicant argued that it was in the public interest for the Ministers to demonstrate that they had managed the historical issues detailed in the Reviews satisfactorily.

The Ministers' submissions on the public interest

61. The Ministers acknowledged the public interest in disclosure of information relating to the development of social security policy and delivery, to promote openness and inform public debate. Having published information on plans for social security powers (including the publication of financial information), the Ministers noted this would continue as plans develop. The Ministers pointed out, however, that these were the early stages in developing the Scottish Government’s responsibility for providing social security aspects previously reserved to the UK Government.
62. Against disclosure, the Ministers identified the public interest in maintaining the integrity of Ministers and officials being able to provide and exchange free and frank advice and views in a private space, to reach a settled conclusion. The Ministers submitted that high quality, fully considered decision-making was essential to the effective delivery of the SSP, and it was vital that the SRO obtained the most comprehensive information and advice to allow rigorous consideration of all options and implications. The Ministers believed there was no public interest in disclosure of information which would inhibit the candour and freedom with which such Gateway Reviews were conducted and opinions expressed.
63. In conclusion, the Ministers believed the public interest in disclosure of the information was significantly outweighed by that in allowing Ministers and officials a private space to provide

¹ <https://www.audit-scotland.gov.uk/report/social-security-implementing-the-devolved-powers>

free and frank advice without fear that disclosure would compromise the decision-making process.

The Commissioner's views on the public interest – section 30(b)(i)

64. The Commissioner has considered carefully all the public interest arguments he has received. He must consider the actual circumstances of the case, and whether the Ministers were correct in their decision, at the time they responded to the request and subsequent requirement for review. That position may change in time, but the issue here is whether the Ministers responded to this particular request correctly at the relevant time.
65. The Commissioner accepts that disclosure of this remaining information where the requirements of section 30(b)(i) have been met, provided by individuals with no expectation that this would be made public, would have an adverse impact on such candid views being provided in future, and particularly in view of the fact that further Reviews are to be undertaken. In order to be able to conduct a thorough Review of this nature, accurately reflecting the position at the material time, the Commissioner recognises the importance that individuals are allowed to provide candid comments safe in the knowledge that these views will not be further shared. He acknowledges that deviation from this would lead to less candid views being provided in future.
66. The Commissioner also accepts that Ministers and officials must have a private space in which to freely consider and debate these views in order to reach an informed conclusion. He agrees that disclosure of the remaining withheld information would, or would be likely, to inhibit the manner in which such Reviews are currently undertaken.
67. In all of the circumstances of the case, therefore, the Commissioner finds that, for the remaining information withheld under section 30(b)(i), the public interest in maintaining the exemption in the circumstances of this case outweighed that in making the information available, at the time the Ministers responded. He therefore concludes that the Ministers were entitled to withhold the remaining information under section 30(b)(i) of FOISA.

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

68. Section 30(c) of FOISA provides that information is exempt 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.
69. 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 applying 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.
70. There is no definition of "substantial prejudice" in FOISA, 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: 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.
71. In this case, the Ministers relied on section 30(c) to withhold some information in the Gateway Review Healthcheck dated May 2018.

The Applicant's submissions

72. In his submissions to the Commissioner, the Applicant highlighted that the report in question was now over 18 months old. He provided submissions on the nature of the information withheld:
- Plans for future benefit delivery: The Applicant noted that this Review was carried out just after the Social Security (Scotland) Act 2018² (the Act) had been passed, and that the Scottish Government had since continued to provide a substantial update on its policy decisions about plans for future benefit delivery. While the Applicant acknowledged the harm in disclosure of policy information prior to informing Parliament, he believed it likely that Parliament had been updated on these issues and the information acted on, thus reducing the sensitivity of the information.
 - Financial plans: The Applicant submitted that public and parliamentary debate had considered the Programme's financial plans, where the £308m programme budget (in the Financial Memorandum for the Act) had been accepted as being out of date. He argued that reporting surrounding this had not resulted in the prejudice claimed by the Ministers.
 - Structuring of Operations: The Applicant submitted that organisational change relating to the Directors had been discussed at Social Security Committee and implemented at Social Security Scotland, with a number of changes to senior management already having taken place. In his view, the Ministers had not demonstrated how disclosure of this information would cause serious harm and ultimately impact the Scottish Government's ability to implement changes.
 - Accommodation: The Applicant questioned the Ministers' claim that disclosing insights into the negotiating position would undermine current negotiations, particularly as the Agency's requirements were reported to the Public Audit and Post-Legislative Scrutiny Committee in September 2019. In his view, any harm in securing best value lay not in disclosure, but in the Agency's requirements and its negotiating position, due to the scarcity of the accommodation required (already publicly disclosed).

The Ministers' submissions

73. In their submissions to the Commissioner, the Ministers argued that disclosure would reveal information about the Scottish Government's ongoing accommodation needs, plans for future benefit delivery, resourcing/budgetary considerations and structuring of operations.
74. In the Ministers' view, disclosure of information on accommodation (which included length of current leases, constraints on accommodation provision and future requirements, including preferred type) would weaken their negotiating position by giving providers an insight into the level of need. They argued that this would substantially impact their ability to secure suitable accommodation at best value.
75. The Ministers also took the view that disclosure of information concerning future benefit delivery, resourcing/budgets and structuring of operations, prior to this being announced to Parliament, Social Security Committee and (in respect of operational structuring) before agreement and announcement within the Directorate, would undermine the effective conduct of the Programme.

² <http://www.legislation.gov.uk/asp/2018/9/contents>

The Commissioner's views on section 30(c)

76. The Commissioner has taken account of all of the relevant submissions, together with the withheld information.
77. In assessing whether the exemption in section 30(c) applies, the Commissioner has taken account of a number of factors, including the timing of the request. He must make his decision based on the Ministers' position at the time they issued their review outcome.
78. In the Commissioner's view:
- Plans for future benefit delivery: The Commissioner notes that this relates to the possible timetabling of specific grants, which have since been introduced. Although this information was not in the public domain at the time the Ministers responded to the requirement for review, it is apparent from what was disclosed to the Applicant at review stage that these were benefits to be delivered in the short to medium term. In that context, it is not apparent why the information should be so sensitive.
 - Financial plans: The Commissioner notes that the withheld information does not detail the actual plans. While he acknowledges that disclosure of the plans themselves might result in the harm envisaged by the Ministers, the Commissioner is not satisfied that the Ministers have sufficiently evidenced how this would result from disclosure of this particular, and somewhat generalised, information.
 - Operational Structures: The Commissioner notes that the Social Security Directorate is responsible for the safe and secure transition of benefits being devolved to Scotland under the Scotland Act 2016. As such, he is not satisfied that disclosure of this information would undermine the effective management and oversight of government business.
 - Accommodation: The Commissioner notes that the withheld information relates to accommodation (constraints and ongoing/future needs), disclosure of which, the Ministers claim, would impact their ability to negotiate and secure suitable accommodation at best value. The Ministers have already disclosed that "interim" accommodation has been identified. As such, the Commissioner fails to see how disclosure of the withheld information (which, with the exception of the lease lengths, is fairly non-specific), would harm the Ministers' negotiating powers in securing future accommodation requirements at best value. The Commissioner also notes that, in a more recent Healthcheck Review (dated February 2019), the Ministers have disclosed some further information concerning accommodation requirements. Clearly, the Ministers did not consider disclosure of this information to be harmful, and in this context it is not apparent to the Commissioner (from all the submissions he has received) why disclosure of the withheld information should still have been considered harmful at the time of the Ministers' review.
79. In conclusion, the Commissioner finds that the Ministers were not entitled to withhold this information under section 30(c) of FOISA. Given this finding, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.
80. As the Ministers are not relying on any other exemption to withhold this information, he requires the Ministers to disclose it to the Applicant.

Compliance

81. The Commissioner requires the Ministers to disclose to the Applicant the information he has found to have been wrongly withheld, which will be intimated to the Ministers in a separate schedule.

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 Commissioner finds that, by the end of the investigation, the Ministers had correctly withheld some information under section 30(b)(i) (Prejudice to effective conduct of public affairs) and, in that respect, complied with Part 1 of FOISA.

However, he also finds that the Ministers failed to comply with Part 1 by wrongly withholding some other information under the exemptions in section 28(1) (Relations within the United Kingdom), section 29(1)(a) (Formulation of Scottish Administration policy etc.), and section 30(b) and (c) (Prejudice to effective conduct of public affairs) of FOISA. This was in contravention of section 1(1) of FOISA. For the information he has found to have been wrongly withheld, and not already disclosed, the Commissioner requires the Ministers to disclose this information to the Applicant.

The Commissioner therefore requires the Ministers to disclose to the Applicant the information he has found to have been wrongly withheld (and not already disclosed) by **15 March 2021**.

Appeal

Should either the Applicant or the Ministers wish to appeal against this decision, they have the right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days after the date of intimation of this decision.

Enforcement

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

Daren Fitzhenry
Scottish Information Commissioner

28 January 2021

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.

...

28 Relations within the United Kingdom

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially relations between any administration in the United Kingdom and any other such administration.

...

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

- (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.

Scottish Information Commissioner

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