

# Decision Notice



Decision 117/2008 Matthew Clark and the Scottish Ministers

Letters and meeting papers (Scotland/Northern Ireland dialogue)

Reference No: 200800397

Decision Date: 16 September 2008

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr Matthew Clark (Mr Clark) requested from the Scottish Ministers (the Ministers) the full content of letters between the First Ministers of Scotland and Northern Ireland, along with other information relating to meetings between Scottish and Northern Ireland Ministers. The Ministers responded by supplying the agenda for a specified meeting but withholding information from the remaining documents (most of which were supplied in part) under various exemptions in FOISA.

Following a review, Mr Clark remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation (in the course of which further information was supplied to Mr Clarke), the Commissioner found that the Ministers had dealt with Mr Clark's request for information in accordance with Part 1 of FOISA, in that they had been justified in withholding the remaining information as information relating to the formulation or development of government policy under section 29(1)(a) of FOISA.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a), (2), (3) and (4) (Formulation of Scottish administration policy etc.).

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

## Background

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1. On 23 November 2007, Mr Clark wrote to the Ministers requesting the following information:  
“Details of the full content of the letters sent by the First Minister to Rt Hon Ian Paisley in June 2007 and the reply received in August 2007; the full agenda of the meeting on 30 July 2007 between Fiona Hyslop and Sir Reg Empey; and the full material prepared for the meeting between Jim Mather and Nigel Dodds on 9 October.”



2. The Ministers responded on 7 January 2008 and provided Mr Clark with the full agenda for the meeting of 30 July 2007. The Ministers also provided a copy of each of the letters requested with redactions in terms of sections 29(1)(a) and 38(1)(b), and also copies of three documents in relation to offshore electricity transmission, tourism and student support arrangements, which had been prepared for the meeting of 9 October 2007 and which the Ministers had redacted in terms of sections 28(1) and 29(1)(a) of FOISA.
3. On 11 January 2008, Mr Clark wrote to the Ministers requesting a review of their decision. He noted that the dialogue out of which the requested information had arisen had been the subject of extensive publicity and asked the Ministers to consider whether further relevant information had by then been released by the Northern Ireland Assembly (NIA).
4. The Ministers notified Mr Clark of the outcome of their review on 11 February 2008. The Ministers provided Mr Clark with a further copy of one of the letters while upholding the use of sections 28(1) and 29(1)(a) of FOISA in relation to the remaining information. They had not identified any further relevant releases of information by the NIA.
5. On 14 March 2008, Mr Clark wrote to the Commissioner's Office, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Clark had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

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7. On 1 April 2008, the Ministers were notified in writing that an application had been received from Mr Clark and asked to provide the Commissioner's Office with any information withheld from the applicant. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on the provisions of sections 28(1) and 29(1)(a) of FOISA.
9. During the investigation the Ministers released the documents in relation to offshore energy transmission and tourism in full. They also released further copies of the letters with fewer redactions. However, they maintained the application of section 28(1) and 29(1)(a) of FOISA (along with section 30(b)(i) and (ii), on which they supplied arguments in the course of the investigation) in relation to other redactions from the letters in question and to the document relating to student support arrangements.



10. On being provided with this further release of information, Mr Clark intimated that he wished a decision from the Commissioner in relation to the remaining redactions. This decision will therefore consider these redactions only.

## Commissioner's analysis and findings

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11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions that have been presented to him by both Mr Clark and the Ministers and is satisfied that no matter of relevance has been overlooked.
12. The Ministers relied upon sections 28(1), 29(1)(a) and 30(b)(i) and (ii) of FIOSA in relation to the withheld information. The Commissioner will first of all consider the application of section 29(1)(a).
13. In terms of section 29(1)(a) of FOISA, information held by the Scottish Administration is exempt information if it relates to the formulation or development of government policy. It should also be noted that section 29(2) of FOISA states that once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of section 29(1)(a), as relating to the formulation or development of the policy in question. Further, section 29(3) states that in determining any question under section 2(1)(b) of FOISA (the public interest test) as respects information which is exempt information by virtue of section 29(1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
14. The reasoning behind the section 29(1)(a) exemption in FOISA is to ensure that, where appropriate, Scottish Administration policy can be formulated and developed effectively by allowing the Administration to discuss matters in a candid and frank manner. The section 29(1)(a) exemption is qualified, which means that even if information is exempt under it, the application of the exemption is subject to the public interest test contained in section 2(1)(b) of FOISA.
15. The section 29 exemptions in FOISA are sometimes referred to as "class-based" exemptions, a term which was adopted during the consultation process for the proposed Scottish freedom of information legislation to describe the scope of the exemption. For such an exemption to apply, it will be sufficient for the information in question to fall within the description specified in the exemption: there is no need to demonstrate harm. It does not follow, however, that a document given the relevant description can be presumed to be exempt in its entirety. As the Ministers' own internal guidance on exemptions under FOISA clearly states: "It is not the nature of the document itself that is determinative but the substance of the information contained within it" – the authority must always be able to justify any decision that particular information falls within the class covered by the exemption.



16. For information to fall under the section 29(1)(a) exemption, it must relate to the process of formulating or developing government policy, i.e. options and priorities for Scottish Ministers, who will subsequently determine which options should be translated into political action and when.
17. The Commissioner has taken the view that “formulation” means the output from the early stages of the policy process where options are generated and considered, risks are identified, consultation occurs and recommendations/submissions are made. He has also taken the view that “development”, although sometimes used interchangeably with “formulation,” may go beyond this stage. It may refer to the processes involved in reviewing, improving on or altering existing policy and could involve piloting, monitoring, analysing, reviewing or recording the effects of that existing policy.
18. In this case the Ministers argue that the withheld information explores the main options in a given devolved policy area, discussing their relative pros and cons and in particular the political sensitivities and costs which might arise from them. They characterise this as an early stage of the policy process, where the options are identified and the risks calculated, which they consider to be clearly part of the formulation of policy.
19. Whilst it is not possible to reproduce the Ministers’ arguments any more fully within this decision, because to do so would out of necessity mean disclosing the withheld information, the Commissioner is satisfied that the remaining redacted information does in fact relate to the development of options and priorities for further consideration by Scottish Ministers. As such, he accepts that the withheld information relates to the formulation of government policy and therefore that it is exempt under section 29(1)(a) of FOISA. He does not consider the provisions of either section 29(2) or section 29(3) to be applicable in the circumstances.

### **The Public Interest**

20. As indicated above, the exemption under section 29(1)(a) is subject to the public interest test and therefore the Commissioner must be satisfied that the public interest in maintaining the exemption outweighs that in disclosing the relevant information if the information is to be withheld. Given the class nature of section 29, it will be in considering the public interest that it is appropriate to examine in detail the content of the information, including its relative sensitivity, and the potential effects of disclosure.



21. The Ministers consider that it is essential for officials and Ministers to be able to formulate policy in a private space environment without the fear of premature release. They argue that if it were known, or considered likely, that the options under consideration would be made public at an early stage of policy formulation, officials would be far more reluctant to exercise creativity in devising policy options for discussion. In the Ministers' view, the potential early release of policy options, radical or otherwise, could significantly restrict the policy formulation process. They suggest that officials would be concerned that ideas in the early stages of formulation, with no guarantee or expectation of further development, would be released entirely out of context. This could easily result, they submit, in a far more conservative approach to policy formulation and less inclination to consider a full variety of options. In this particular case, they point out that there is still no agreed policy on the relevant issues and consequently the options identified remain under consideration.
22. The Ministers acknowledge a public interest in openness and transparency in policy formulation and the Commissioner would agree that there will generally be a public interest in making information held by public authorities accessible, to enhance scrutiny of decision making and thereby improve accountability and participation. In this case, however, the Ministers argue that this general public interest is outweighed by that in allowing them and their officials time and space to formulate policy freely without the fear of premature disclosure.
23. The Ministers contend that there is clearly a strong public interest in high quality policy-making and implementation and for this to be achieved Ministers and officials need to be able to consider all available options, however unpalatable, and to be able to debate these rigorously in order to expose their merits and demerits. They reiterate that the redacted information was produced at the earliest stages of policy formulation and with no expectation of release. Indeed, they argue, officials would fully expect that early policy options would be formulated entirely in a private arena.
24. The Ministers also consider that any expectation that early policy formulation would be released would undoubtedly impact on officials' general willingness to contribute to a full consideration of all possible options. In addition, they cannot see any public interest in the premature release of policy options, most of which will (they suggest) inevitably fall by the wayside. They therefore strongly believe that the balance of the public interest is in accepting the benefits of allowing policy discussion to proceed without contemporaneous release of the content of that discussion.
25. In coming to a conclusion on this matter, the Commissioner has taken account of the content and context of the information withheld and considered whether its release would contribute to the general public interest in openness and transparency identified in paragraph 22 above. More particularly, he has considered whether it would contribute to debate on a matter of public interest. Whilst the Commissioner accepts that release could contribute to public debate, he is also of the opinion (given the nature of the withheld information, in the context of early deliberation on the formulation of a policy which remains incomplete and under active consideration) that in this particular case there is a rather stronger public interest in maintaining the exemption.



26. The Commissioner therefore finds, in all the circumstances of this case, that the public interest in maintaining the exemption in section 29(1)(a) of FOISA outweighs the public interest in disclosure of the remaining withheld information, and consequently upholds the Ministers' decision to withhold that information under section.
27. Since the Commissioner has accepted that the information was properly withheld under section 29(1)(a) of FOISA, he will not go on to consider the application of the other exemptions claimed by the Ministers.

## DECISION

The Commissioner finds that the Scottish Ministers acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Clark.

## Appeal

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Should either Mr Clark or the Scottish Ministers wish to appeal against this decision, there is an 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**16 September 2008**



## Appendix

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### Relevant statutory provisions

#### Freedom of Information (Scotland) Act 2002

##### 1 General entitlement

- (1) A person who requests information from a Scottish public authority which holds it is entitled to be given it by the authority.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

##### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

##### 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;

...

- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of-

- (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or

- (b) paragraph (b) of that subsection, as relating to Ministerial communications.





- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (4) In this section-
  - "government policy" means-
    - (a) the policy of the Scottish Administration;
    - ...