

Decision Notice

Decision 161/2014 Mr Tom Gordon and the Scottish Ministers

Modelling exercise in relation to childcare and female labour market participation

Reference No: 201400892

Decision Date: 21 July 2014



Scottish Information
Commissioner

Summary

On 21 January 2014, Mr Gordon asked the Scottish Ministers (the Ministers) for the results of a modelling exercise referred to in a Scottish Government paper on childcare and female labour market participation. The Ministers withheld the information under section 29(1)(a) of FOISA on the basis that it related to the formulation or development of government policy.

The Commissioner found that the Ministers were entitled to withhold the information under this exemption.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a) and (2)(a) (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

1. On 21 January 2014, Mr Gordon emailed the Ministers with the following request:

“On 12 January 2014, the Scottish Government published a paper titled ‘Childcare and Female Labour Market Participation’

<http://www.scotland.gov.uk/Resource/0044/00441783.pdf>

It describes the potential economic impact of a rise in female workforce participation modelled using the ‘Computable General Equilibrium model of the Scottish economy’ (p 4 of the paper).

The results of this modelling exercise are presented in part but not in full.

Please supply the full results of the modelling exercise referred to in this paper, including the results for all levels of female participation modelled and their predicted impacts over the timescales modelled.”

2. The Ministers responded on 7 February 2014. They informed Mr Gordon that the information was exempt from disclosure in terms of section 29(1)(a) of FOISA on the basis that it related to the formulation or development of government policy.
3. On 11 March 2014, Mr Gordon emailed the Ministers requesting a review of their decision. Mr Gordon disagreed that the information related to any policies still in development. He also considered that even if the policies were still in development, the public interest favoured disclosing the information.
4. The Ministers notified Mr Gordon of the outcome of their review on 17 April 2014, upholding their original decision without modification.

5. On 24 April 2014, Mr Gordon wrote to the Commissioner, 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. Mr Gordon did not agree that the information was exempt from disclosure under section 29(1)(a) of FOISA. Additionally, he considered that, under section 29(2)(a), any statistical information used to provide an informed background to the taking of the decision ought to be disclosed. This was on the basis that the decision as to policy in this case had already been taken by the Ministers.
6. The application was validated by establishing that Mr Gordon made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 7 May 2014, the Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with the information withheld from him. 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. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
9. The Ministers responded on 16 June 2014 providing submissions on their application of the exemption in section 29(1)(a) of FOISA, and whether any statistical information should be disclosed in terms of section 29(2)(a) of FOISA.

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 her by both Mr Gordon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

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

11. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as Members of the Scottish Executive and junior Scottish Ministers and their staff; and non-ministerial office holders of the Scottish Administration and their staff) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy; it can involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
12. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy, i.e. to the consideration or development of options and priorities for Scottish Ministers, who will subsequently determine which of these should be translated into political action and/or legislation, and when.

13. In his application to the Commissioner, Mr Gordon argued that the policy under consideration (the extension of free childcare provision under independence) was described at length on page 194 of *Scotland's Future*¹ (the Scottish Government's white paper on independence).
14. In Mr Gordon's view, the modelling exercise involved in this case did not model the childcare policy; rather, it modelled the economic impact of putative rises in female workforce participation which may or may not follow such a policy. In his view, the modelling exercise was one removed, at least, from the policy. He noted that the government had already published some of the results of the modelling exercise.
15. The Ministers stated that the withheld information comprised the modelled impact of changes in economic output and tax revenues under different scenarios of increased female participation in the labour market.
16. The Ministers argued that the withheld information comprised part of the evidence base provided to assist them in developing their policy on childcare in the event of independence. They argued that although the strategic policy direction had been set out in *Scotland's Future*, detailed policy design work continued and the details of the policy were yet to be set out. The Ministers submitted that the information was created as part of an ongoing process of developing their position on childcare and that the formulation of the policy remains in development.
17. The Ministers stated that the modelling results presented in the published report *Childcare and Labour Market Participation – Economic Analysis*² provide a high-level summary of the impact of increases in labour market participation on economic output and tax revenues in the long-term. The results for individual years which detail the short and medium-term impacts have been withheld. The Ministers considered that disclosure of the annual short- and medium-term results could be misleading. They stated that the short- and medium-term results reflect a very specific labour market response, from which the long-term results are independent.
18. The Ministers considered that disclosure of the information would give an unjustifiable impression that there is a level of certainty in the information. They argued that these results would be governed by aspects of the policy's design which have yet to be determined. They referred to *Decision 011/2014 Matthew Clark and the Scottish Ministers*³ where (as they saw it) the same issues arose in relation to corporation tax simulation data. In that case, the Commissioner concluded that the Ministers were entitled to withhold the requested information under section 29(1)(a) of FOISA.

The Commissioner's view on the exemption

19. As stated above, policy formulation is considered to encompass the early stages of the policy process, where the options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to the Ministers.
20. The Commissioner understands Mr Gordon's view that that *Scotland's Future* sets out the Ministers' views and policy. However, she does not accept that the policy direction set out in *Scotland's Future* could be interpreted as anything more than high-level policy statements which would be subject to development.

¹ <http://www.scotland.gov.uk/Resource/0043/00439021.pdf>

² <http://www.scotland.gov.uk/Resource/0044/00441783.pdf>

³ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2014/201302133.aspx>

21. The Commissioner accepts the Ministers' position that the detail of the policy under consideration is yet to be finalised and set out. She also accepts that the withheld information relates to the policy, in being part of the evidence base which will inform its development. Therefore, the Commissioner is satisfied that the information falls within the scope of section 29(1)(a) on the basis that it relates to a topic which is a matter of developing policy.
22. The exemption in section 29(1)(a) is a qualified exemption, subject to the public interest test in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

The public interest test

23. The Ministers argued that there was a strong public interest in allowing Ministers and officials the private space to fully develop robust modelling and policies without the need to consider whether the subsequent publication of such information may lead to a misunderstanding of their position or of the likely short to medium-term outcomes. The Ministers took the view that this would include information that is illustrative and, as in this case, information that is only produced as an intermediate step in developing the full evidence and which (in their view) provides no additional insight into the operational and potential effects of the policy.
24. The Ministers also submitted that, if the information was released into the public domain in advance of Ministers finalising the detail of childcare policy, there was a risk that policy formation and decisions would be further complicated and potentially jeopardised. They argued that officials would feel it necessary to exercise significantly more caution in preparing such analysis in future. They considered it less likely that economists would be willing to develop indicative modelling if they felt it would be released into the public domain and taken out of context.
25. The Ministers also considered that premature release of the modelling results would cause confusion and misunderstandings and would deflect the time and energy of Ministers and officials in rectifying this instead of reaching conclusions about underlying policies. They also considered that the information would be taken out of context and used to create uncertainty about the Government's intentions, which would not be in the public interest.
26. Mr Gordon argued that, even if the policy was still in development, the fact that people are being asked to consider it when voting in the forthcoming independence referendum meant that the public interest strongly favoured disclosure of the information.
27. Mr Gordon also argued that the "tweaking" of details of policy is potentially a never-ending task as policies are always liable to refinement. Similarly, he considered that the evidence is always accumulating, so consideration of that evidence may never end.

The Commissioner's view on the public interest

28. The Commissioner has considered carefully the representations made by both Mr Gordon and the Ministers when balancing the public interest both for and against disclosure of the withheld information.
29. The Commissioner acknowledges that there is a general public interest in transparency and accountability and in scrutinising the actions taken by Ministers in the field of policy development.

30. The Commissioner considers that disclosure of the information could offer a more informed public understanding of a key aim of the Ministers in the event of Scottish independence, if only to a limited extent. This could have some bearing on the matters that voters weigh up when viewing the consequences of the forthcoming referendum.
31. The Commissioner accepts that the withheld information in this case is relevant in informing the Ministers' consideration and refinement of policy development and options which were current when they dealt with this request and requirement for review (and remain so).
32. The Commissioner acknowledges the general public interest in allowing all options to be explored and considered by the Ministers while policy-making is ongoing, before a settled public view is reached. In her view, there is sufficient evidence that the policy in this case is not finalised and could continue to evolve.
33. The Commissioner notes Mr Gordon's points regarding the ongoing refinement of policy. She recognises that policies will be honed and subject to amendment throughout the initial stages of development and beyond. In this case, she is satisfied that the information under consideration informed a high level policy direction rather than representing a settled and finalised policy.
34. The Commissioner does not consider that the danger of information being misinterpreted (as suggested by the Ministers) constitutes sufficient grounds for withholding it, in itself. In her view, even if the information under consideration in this case could be considered for disclosure alongside an accompanying explanation and disclaimer regarding its context and purpose, the public interest would still favour maintaining the exemption.
35. In the absence of overriding public interest considerations favouring disclosure in this case, the Commissioner considers it is in the public interest that the Ministers should be able to formulate policy fully, without being drawn into a public debate on matters which may never form part of their finalised policy position.
36. In all the circumstances of this case, the Commissioner has concluded that the public interest in disclosure of the withheld information is outweighed by the public interest in maintaining the exemption in section 29(1)(a) of FOISA. The Ministers were therefore entitled to withhold the information under this exemption.

Section 29(2)(a) of FOISA – statistical information

37. Section 29(2)(a) of FOISA provides that, once a decision as to policy has been taken, statistical information used to provide an informed background to the taking of the decision cannot be regarded as relating to the formulation or development of the policy in question.
38. As noted above, in his application to the Commissioner, Mr Gordon submitted that the provisions of section 29(2)(a) would allow the information to be disclosed. This was on the basis that the Ministers had taken a decision in relation to policy.
39. As noted above, the Commissioner does not agree that a decision has been taken on the final policy in this case. Accordingly, she accepts that the exemption in section 29(1)(a) applies to all of the withheld information in this case which falls within the scope of Mr Gordon's information request.

Decision

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

Appeal

Should either Mr Gordon or the Scottish 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.

Rosemary Agnew
Scottish Information Commissioner
21 July 2014

Appendix

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

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info