

# Decision Notice



Decision 178/2013 Mr Tom Gordon and the Scottish Ministers

Scotland's position in the EU post-independence: request to the Law Officers for advice

Reference No: 201301263  
Decision Date: 16 August 2013

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**Rosemary Agnew**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

On 5 March 2013, Mr Gordon asked the Scottish Ministers (the Ministers) for the Scottish Government's submissions to the Law Officers for legal advice regarding an independent Scotland's position within the EU. The Ministers withheld the information under the exemptions in sections 29(1)(c) (provision of advice or request for the provision of advice by the Law Officers) and 36(1) of FOISA (legal professional privilege).

Following an investigation, the Commissioner was satisfied that the Ministers had properly applied section 29(1)(c) of FOISA and so the information was exempt from disclosure.

## Relevant statutory provisions

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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)(c) (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 5 March 2013, Mr Gordon emailed the Ministers requesting all information contained in the Scottish Government's formal submission to the Law Officers seeking specific legal advice on the position of Scotland within the European Union if independence is achieved. Mr Gordon referred to the Deputy First Minister's statement to the Scottish Parliament on 23 October 2012 where she confirmed that the legal advice had been commissioned.
2. The Ministers did not respond to this request. On 10 April 2013, Mr Gordon emailed the Ministers requesting a review of their failure to respond. As Mr Gordon did not express dissatisfaction about this in his application to the Commissioner, this has not been investigated or subsequently referred to in this decision.



3. Mr Gordon received the outcome of the Ministers' review on 5 May 2013 (the letter itself is dated "April 2013"). The Ministers informed Mr Gordon that they considered the information was exempt from disclosure in terms of sections 29(1)(c) of FOISA on the basis that the information related to a request for the provision of advice by any of the Law Officers. The Ministers also considered the information was exempt from disclosure in terms of section 36(1) of FOISA on the basis that it comprised privileged communications between solicitor and client.
4. On 28 May 2013, 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.
5. The application was validated by establishing that Mr Gordon 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. The case was then allocated to an investigating officer.

## Investigation

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6. On 7 June 2013, 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 were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). Additionally, the Ministers were asked to respond to specific questions justifying their reliance on any provisions of FOISA they considered applicable to the information requested.
7. The Ministers responded with the information requested and provided submissions on why they considered the information to be exempt from disclosure in terms of sections 29(1)(c) and 36(1) of FOISA.

## Commissioner's analysis and findings

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8. 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)(c) – request for the provision of advice by Law Officers

9. The Ministers have applied the exemption in section 29(1)(c) of FOISA to all of the information withheld from Mr Gordon.



10. Under section 29(1)(c) of FOISA, information held by the Scottish Administration is exempt from disclosure if it relates to the provision of advice by any of the Law Officers or any request for the provision of such advice. The phrase "Law Officers" is defined in section 29(4) as the Lord Advocate, the Solicitor General for Scotland, the Advocate General for Scotland, the Attorney General, the Solicitor General and the Attorney General for Northern Ireland.
11. Section 29(1)(c) is a qualified exemption, which means that even if the exemption applies, the application of the exemption is subject to the public interest test required by section 2(1)(b) of FOISA.
12. The Ministers have confirmed publicly that they have sought advice from the Law Officers. Having viewed the withheld information, the Commissioner is satisfied that the information withheld from Mr Gordon clearly relates to a request for the provision of advice by the Law Officers and is therefore exempt under section 29(1)(c) of FOISA.

### The public interest test

13. Having concluded that the information is exempt from disclosure under section 29(1)(c), the Commissioner is required to apply 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 maintaining the exemption (i.e. withholding the information) outweighs the public interest in disclosing the information. Unless it does, the information must be disclosed.
14. In his application, Mr Gordon referred to a previous decision of the Commissioner; *Decision 111/2012 Catherine Stihler MEP and the Scottish Ministers*<sup>1</sup>. Mr Gordon noted that the decision considered the position in September 2011, when no specific legal advice had been sought. Mr Gordon also noted that the Commissioner had commented within that decision (at paragraph 53), that she considered there was a strong public interest in allowing the public to understand the process by which the policy would be formulated. Mr Gordon submitted that the process has advanced considerably since then. In his view, the public interest in disclosure is far greater now.
15. Mr Gordon also pointed out that he had only asked for the Ministers' request to the Law Officers. He considered it was in the public interest to know which aspects of EU membership Ministers believe most relevant to independence. He commented that he had not asked for the Law Officers' response and, in his view, disclosing the request for advice would not inhibit the formulation of Government policy.
16. Additionally, Mr Gordon argued that the public interest was best served by transparency on this issue, given the importance of the independence referendum to the people of Scotland and the importance of EU membership in the associated public debate.

<sup>1</sup> <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101968.aspx>



17. The Ministers submitted that the language of section 29(1)(c) was intended to reflect the substance of the Law Officers' Convention. The Ministers stated that this was a long standing rule adopted by the UK Government and, since devolution, also by the Scottish Government for the promotion of good government. The Convention requires that the confirmation or content of advice given by Law Officers to the Government cannot be disclosed outside the Government without the Law Officers' consent. The Ministers noted that the Law Officers' Convention is also reflected in the Scottish Ministerial Code<sup>2</sup>.
18. The Ministers explained that a request for advice will, as in this case, set out the background to the case and provide the Scottish Government Legal Directorate's (SGLD) own legal analysis of the issue. The Ministers submitted that it was important that any request for advice contained a full and frank analysis of the issues, which the fact of confidentiality made possible. The Ministers stated that, since requests for Law Officer advice will usually relate to matters of particular sensitivity, complexity or uncertainty, the content of a submission to the Law Officers will usually be of particular sensitivity.
19. The Ministers submitted that any public interest arguments for disclosure must be weighed against the strong public interest in maintaining confidentiality of communications between the Law Officers, the SGLD and Ministers in relation to requests for their legal advice. The Ministers considered there would be consequent harm to the public interest if this confidentiality was not maintained. In the Ministers' view, an expectation that advice and discussions such as this could be released would inevitably lead to such requests, and the consequent advice, being more circumspect and therefore less effective.
20. The Ministers also submitted that it was in the public interest to avoid undermining the Law Officers' Convention by releasing the contents of any request for advice. The Ministers considered that the request in this case would divulge significant amounts of detail about the issues the Law Officers were being asked to consider and the views of senior SGLD lawyers on these issues.
21. In conclusion, the Ministers considered that any public interest could be satisfied by the Scottish Government's commitment to set out its position on EU membership fully in the White Paper on independence (the White Paper), due to be published in November 2013<sup>3</sup>, which will be consistent with the legal advice it has received. The Ministers stated that the White Paper will include the wider context surrounding the legal position regarding Scotland's membership of the EU, without which any legal advice could be misconstrued.
22. The Commissioner has considered all of the submissions put to her regarding the public interest in this case.

<sup>2</sup> <http://www.scotland.gov.uk/Publications/2011/12/01141452/0>

<sup>3</sup> <http://www.scotland.gov.uk/Resource/0038/00386123.pdf>



23. The Commissioner accepts that the information under consideration in this case concerns a matter of considerable importance and that there would be a significant public interest in its disclosure. This would contribute to openness and accountability and would allow the public some insight into matters which are considered by Ministers to be of particular relevance in relation to the issue of an independent Scotland's relationship with the EU. The Commissioner believes that disclosure of the information could provide a more informed public understanding of the Ministers' considerations of constitutional matters and the wider topic of public international law.
24. The Commissioner accepts that the forthcoming referendum will potentially effect a momentous change in Scotland's constitutional position. In her view, it is essential that the public should be able to make an informed decision when making their choice in the referendum. The Commissioner believes that disclosure of the matters considered to be of particular relevance by the Ministers could assist the public in better understanding these issues.
25. The Commissioner has considered the points made by Mr Gordon about the public interest in the openness of process. The circumstances of this case are different to the decision to which Mr Gordon referred. In this case, unlike *Decision 111/2012*, it is already a matter of public record that advice had been sought from the Law Officers. The Commissioner does not agree that knowing *what* advice was sought will add to the public's understanding of the Ministers' processes.
26. The Commissioner has pointed out in many decisions that the courts have long recognised the strong public interest in maintaining the right to confidentiality of communications between legal adviser and client on administration of justice grounds. Where information relates to the seeking and providing of advice by Law Officers, FOISA provides specific protection from disclosure under the terms of section 29(1)(c) of FOISA and the Commissioner recognises there is a strong public interest in maintaining the protection that this affords the Law Officers.
27. The Commissioner also notes that the Ministers have given a commitment to setting out their position on EU membership in the forthcoming White Paper which will reflect the legal advice they have received.
28. In the Commissioner's view, the exemption in section 29(1)(c) clearly creates an expectation that requests for advice to the Law Officers should be protected under FOISA. The Commissioner accepts that such requests will usually relate to matters of particular sensitivity and considers it is in the public interest that Ministers are able to seek such advice in confidence.
29. Having considered the competing arguments for and against disclosure, the Commissioner is not persuaded that there is an overriding public interest in the disclosure of the information withheld in response to Mr Gordon's request. In particular, the Commissioner acknowledges the Ministers' commitment to setting out their position on EU membership in the forthcoming White Paper.



30. On balance, therefore, the Commissioner finds that the public interest in maintaining the exemption in section 29(1)(c) outweighs the public interest in the disclosure of the information withheld by the Ministers in this case. The Commissioner therefore finds that the Ministers acted in accordance with Part 1 of FOISA by withholding this information in response to Mr Gordon's request.
31. Having reached this conclusion, the Commissioner has not gone on to consider the remaining exemption applied to this information by the Ministers.

## **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**

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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**  
**16 August 2013**



## 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-

...

- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or

...