

Decision Notice



Decision 198/2013 Mr David Rule and the Scottish Ministers

Scotland's status within NATO

Reference No: 201300722

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Summary

On 25 October 2012, Mr Rule asked the Scottish Ministers (the Ministers) for information regarding Scotland's status within NATO, or any application to join NATO, should Scotland choose to break away from the United Kingdom. The Ministers provided links to information they considered reasonably obtainable and withheld other information under exemptions in FOISA, including that relating to the formulation or development of government policy.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the information as information relating to the formulation of Scottish government policy.

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 (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

1. On 25 October 2012, Mr Rule wrote to the Ministers with the following requesting:
I would like to know whether or not the Scottish Executive holds information regarding Scotland's status within NATO or any application to join NATO should Scotland choose to break away from the United Kingdom. If you do hold such information, I would like to receive a copy.
2. Having received no response, on 27 November 2012 Mr Rule wrote to the Ministers, requesting a review in respect of that failure.



3. Mr Rule did not receive a response to his request for review and, on 7 January 2013, wrote to the Commissioner applying for a decision in terms of section 47(1) of FOISA. This resulted in *Decision 024/2013*¹, which required the Ministers to respond to the request for review.
4. The Ministers carried out their review and notified Mr Rule of the outcome on 11 February 2013, apologising for the delay. The review identified information the Ministers considered reasonably accessible to Mr Rule: they applied the exemption section 25 of FOISA to this information and provided links to the information. The Ministers also identified further information, which they withheld under the exemptions in sections 29(1)(a), and 30(b)(i) and 30(b)(ii) of FOISA.
5. On 17 March 2013, Mr Rule 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.
6. The application was validated by establishing that Mr Rule 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 8 April 2013, the Ministers were notified in writing that an application had been received from Mr Rule and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with this information 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 any provisions of FOISA they considered applicable to the information requested (with specific reference to the requirements of the exemptions applied in the review outcome).
9. In relation to the information to which the Ministers applied section 25 of FOISA, Mr Rule's dissatisfaction arose from his inability to locate all of the information, partly because he could not get some of the links provided by the Ministers to work. The Ministers provided updated links or, where this was not possible, copies of the relevant information. Mr Rule then withdrew his application insofar as it related to section 25.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2013/201300065.aspx>



Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Rule 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. In their submissions, the Ministers stated that they had applied this exemption to all the information they held concerning Scotland's potential future relationship with NATO.
12. Under section 29(1)(a) of FOISA, information held by the "Scottish Administration" (defined in section 126 of the Scotland Act 1998 as comprising members of the Scottish Executive, junior Scottish Ministers and non-ministerial office holders, with their staff) is exempt information if it relates to the formulation or development of government policy. Section 29(4) defines "government policy" as including the policy of the Scottish Administration.
13. The Commissioner's view, as expressed in her briefing on the application of section 29² is that:
- "formulation" suggests 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; while
- "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.
14. Mr Rule, in his application, commented that the Ministers' response to him suggested that the withheld information was factual information. He did not believe the exemption could be applied to all the information withheld. He highlighted the a quote from the Commissioner's briefing on Section 29:
- Information, whether sensitive or innocuous, will be covered by this exemption if it relates to policy formulation or its development (see Decision 075/2006 Mr Paul Hutcheon and the Scottish Executive). However, the Commissioner considers that for the exemption to apply, the information must specifically relate to the process of formulation or development of policy. The Commissioner rejected the argument that all information with any association with policy development is automatically covered by section 29(1)(a).*
15. Mr Rule was of the view that the Ministers might "have been too quick to include information under this exemption when its association to policy development is not sufficient to be covered by Section 29".

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section29/Section29.aspx>



16. For information to fall under this exemption, it need only relate to the formulation or development of government policy. There is no need to demonstrate harm to these processes.
17. The Ministers stated that they were applying this exemption because the information had been provided to the Scottish Government and/or to Scottish Ministers for the purpose of formulating and developing the Ministers' policy on Scotland's future relationship with NATO in the event of a "yes" vote in the 2014 Referendum.
18. Having considered the withheld information, the Commissioner accepts that it is information which relates to the formulation of government policy, and therefore falls within the scope of the exemption in section 29(1)(a).
19. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is 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

20. Mr Rule identified a strong public interest in understanding the consequences of constitutional change in Scotland, which he believed would favour disclosure.
21. The Ministers acknowledged the public interest in the likely position Scotland would find itself in if there were to be a "yes" vote in the 2014 Referendum, and so in the advice received. They believed this to be significantly outweighed by the negative impact disclosure of the information could have on Scotland's negotiating position on this critical issue, in the event of Scottish independence. They also believed premature disclosure of options currently under consideration was likely to inhibit the ongoing policy development process, including the commissioning of further advice as part of that process.
22. The Ministers considered the relative lack of detail and early stage of development of the information as factors weighing against disclosure. They also stated that they had been influenced by their commitment to setting out the results of this process, by publishing their proposals for defence and security in an independent Scotland, later in 2013 (i.e. in the Referendum White Paper).
23. The Commissioner has considered carefully the submissions made by both Mr Rule and the Ministers, together with the withheld information. She has also taken into consideration other relevant factors relating to the request, including its timing in relation to the information and the development of the relevant policy.

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24. The Commissioner agrees with the Ministers that the information represents an early stage in the formulation of policy in this area (bearing in mind that the timescales in this case are determined by the date of the Minister's review, not the date of this decision). The information was created only shortly before Mr Rule's request and was still current and under active development at the time of the review.
25. The Commissioner accepts that there would be a public interest in disclosure of the information, as it would contribute to openness and accountability, and assist the public in understanding the full context in which policy decisions are made. In this case, the request relates to a matter of significant public interest, particularly in the context of the 2014 Referendum.
26. The Commissioner also accepts the importance of allowing all options to be explored and considered by the Ministers, particularly at so early a stage in the formulation and development of the policy in question. She acknowledges that it is in the public interest that Ministers should be able to formulate policies fully, without being drawn unnecessarily into public debate on matters that may never form part of their finalised policy position. In this case, she notes the Ministers' intention to publish the results of this process later in 2013.
27. The Commissioner concludes, in all the circumstances of this case, that the public interest in disclosure of the information under consideration is outweighed by that in maintaining the exemption in section 29(1)(a) of FOISA. Consequently, the Ministers were entitled to withhold the information in terms of section 29(1)(a).
28. Having concluded that all the information falling within the scope of Mr Rule's request was properly withheld at the relevant time under section 29(1)(a) of FOISA, the Commissioner is not required to consider any further exemptions in this case.



DECISION

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

Appeal

Should either Mr Rule or the Scottish Ministers (the 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.

Rosemary Agnew
Scottish Information Commissioner
12 September 2013



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;

...

- (4) In this section-

"government policy" means-

- (a) the policy of the Scottish Administration; and

- (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

...

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