

# Decision Notice



Decision 214/2012 Mr X and the Scottish Ministers

Scottish representation on the Bank of England Monetary Policy Committee

Reference No: 201201764

Decision Date: 18 December 2012

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

Mr X asked the Scottish Ministers for a range of information relating to Scottish representation on the Bank of England Monetary Policy Committee (the MPC) in the event of Scotland separating from the rest of the United Kingdom.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the information as it related to the formulation of Scottish government policy. Given that the information comprised early views and options for the formulation of fiscal policy, the public interest in withholding it outweighed the public interest in 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)(a) and (4)(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

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1. On 29 May 2012, Mr X emailed the Ministers requesting the following:
  - All information held by the Scottish Government relating to what representation Scotland would have on the Bank of England Monetary Policy Committee (MPC) if Scotland separated from the rest of the UK.
  - All information contained in correspondence sent to and sent from the Scottish Government relating to what representation Scotland would have on the MPC if Scotland separated from the rest of the UK (including, but not limited to, correspondence with the UK Government and Bank of England).
  - All information provided to Ministers relating to what representation Scotland would have on the MPC if Scotland separated from the rest of the UK.



- All information held relating to the Deputy First Minister's comments on the BBC Scotland programme, The Big Debate – Choosing Scotland's Future, on 27 May 2012 that "there is no Scottish representation on the MPC, something that would change if Scotland was independent".
- 2. The Ministers responded on 27 June 2012. The Ministers advised Mr X that they considered the information to be exempt from disclosure under the exemptions in sections 29(1)(a) and 30(b) of FOISA.
- 3. On 2 July 2012, Mr X emailed the Ministers requesting a review of their decision. Mr X said he understood that the Ministers already had an existing policy on this matter and the policy could not, therefore, be in the process of formulation. Additionally, Mr X did not consider the exemptions in section 30(b) to be applicable to the information and, in any case, considered the public interest favoured its disclosure.
- 4. The Ministers notified Mr X of the outcome of their review on 31 July 2012, upholding their previous decision without modification.
- 5. On 14 September 2012, Mr X 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 X 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 18 September 2012, the Ministers were notified in writing that an application had been received from Mr X and were asked to provide the Commissioner with the information withheld from him. The Ministers responded with the information requested, indicating that, at this stage, they considered the exemption in section 36(2) of FOISA also applied to some of the withheld information. 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.
- 9. The Ministers responded on 29 November 2012, providing submissions supporting their application of the exemptions in sections 29(1)(a), 30(b) and 36(2) of FOISA including their views on the public interest test (where appropriate).



10. At this stage, the Ministers also disclosed some of the information that had previously been withheld from Mr X. The information that has been disclosed has not been considered within this decision.
11. The relevant submissions received from both Mr X and the Ministers will be considered fully in the Commissioner's analysis and findings below.

## Commissioner's analysis and findings

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12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr X and the Ministers and is satisfied that no matter of relevance has been overlooked.

### Consideration of section 29(1)(a)

13. 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.
14. 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.
15. In this case, the Ministers have applied section 29(1)(a) to all of the withheld information on the basis that it relates to the formulation of Scottish Government policy on the type of representation that an independent Scotland might have on the MPC.
16. The Ministers explained that work is currently ongoing to finalise and refine details of the macroeconomic framework for an independent Scotland, of which representation on the MPC will be one constituent part. The Ministers argued that the withheld information in this case identifies issues which are current and on which officials and Ministers will continue to hold discussions aimed at resolving policy issues until such time as the outcome of the independence referendum is known. The Ministers submitted that the information provided options and scenarios that may or may not happen for consideration and discussion to inform the development of policy.



17. In his application to the Commissioner, Mr X submitted that the Ministers already have established policy in this area and referred to comments made by the Deputy First Minister on two BBC Scotland programmes. Consequently, he argued, it was not reasonable to claim that the release of the information in this case would inhibit the effective formulation of policy.
18. Having considered the withheld information, the Commissioner accepts that the withheld information is information which relates to the formulation of government policy and, therefore, that it falls within the scope of the exemption in section 29(1)(a) of FOISA. (As noted above, for information to fall under this exemption, it need only “relate” to the formulation or development of Government policy.) The Commissioner notes Mr X’s assertion that the Scottish Government already has a policy in relation to this matter; whilst she has no comment to make on this assertion, she is satisfied that, at the time the information was created, it related to the formulation of policy and therefore came within the scope of the exemption.
19. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out 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. In their submissions, the Ministers argued that there was an important need for both Ministers and officials to have the space in which to fully discuss and develop policies. The Ministers considered it important that consideration can be taken of all, even the most unlikely, outcomes and that Ministers and officials can discuss and debate these in order to reach a considered decision, policy or way forward.
21. In the Ministers’ view, if the withheld information were to be released, officials would exercise an increased degree of caution in preparing such papers in future resulting in a qualitative change in the views expressed, options offered recommendations made and the substance of the actual information. The Ministers submitted that fear over release might incline officials to play down or even ignore any concerns they might have which could limit the range of options considered, rendering the legislative and policy-making process less robust.
22. Additionally, the Ministers considered that if it were generally understood that positions set out in policy papers, particularly drafts, were to be released at an early stage of the debate, the way in which these positions might be interpreted by the public would have a stronger influence on the way policy is developed than a more considered approach looking at a full range of options.
23. In his submissions, Mr X argued that the public interest lay firmly in favour of the release of the information. He submitted that there was a significant public interest in the Scottish government’s policy in this area, evidenced by the widespread media coverage it had attracted to date. He also argued that there was a high level of public interest in the debate on Scottish independence and the release of this information would contribute to and inform that debate.



24. Additionally, Mr X considered the impact that the implementation of this policy would have was potentially very significant and the disclosure of the information would help better understanding of the Scottish Government's position and the impact of independence. Finally, he submitted that disclosure of the information would allow greater scrutiny of the Scottish Government's policies.
25. The Commissioner has considered carefully the representations made by both Mr X and the Ministers when balancing the public interest both for and against disclosure of the information under consideration.
26. The Commissioner agrees that there would be a significant public interest in disclosure of the information as it would contribute to openness and accountability and would assist the public in understanding the very important policy issue under consideration and the consequences of policy decisions.
27. The Commissioner notes that the information under consideration in this case mostly involves draft documents concerning early views and options for the formulation of fiscal policy, with suggested amendments, alterations and alternative points of view. The remaining information comprises an early view on one aspect of fiscal policy, including the issue of the MPC. The Commissioner has concluded that the disclosure of such documents so soon after their creation would be likely to significantly harm the candour with which such drafts, comments or views were made in future development of policy.
28. In the Commissioner's view, it is in the public interest that all options can be explored and considered candidly by the Ministers and that space should be afforded for doing so before reaching a settled public view. This would enable the Ministers to consider a range of options, some of which could be rejected or further developed in the future. In particular, the Commissioner considers it is in the public interest that Ministers should be able to develop and formulate policies fully, without being drawn into a public debate on matters that may never form part of their finalised policy position.
29. The Commissioner therefore concludes 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 and that, consequently, the Ministers were entitled to withhold the information.
30. Having concluded that all of the information falling within the scope of Mr X's information request was exempt from disclosure at the relevant time under the terms of 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 Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr X.

## **Appeal**

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Should either Mr X 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.

**Margaret Keyse**  
**Head of Enforcement**  
**18 December 2012**



## 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;

...

- (4) In this section-

"government policy" means-

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

...



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