

Decision Notice



Decision 266/2013 Mr Stephen Birt and the Scottish Ministers

Legal advice on the position of an independent Scotland within the European Union

Reference No: 201301878

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www.itspublicknowledge.info

Rosemary Agnew

Scottish Information Commissioner

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Summary

On 21 May 2013, Mr Birt asked the Scottish Ministers (the Ministers) for the legal advice obtained by the Scottish Government relating to the position of an independent Scotland applying for EU membership. The Ministers responded by withholding this information under sections 29(1)(c) (which relates to the provision of advice by the Law Officers) and 36(1) (legal professional privilege) of FOISA. Following an investigation, the Commissioner was satisfied that the Ministers were entitled to withhold this information under section 29(1)(c).

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)(c) and (4) (definition of “the Law Officers”) (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 May 2013, Mr Birt wrote to the Ministers requesting the following information:
“... the legal advice obtained by the Scottish Government relating to the position of an independent Scotland applying for EU membership. I understand this advice has been received recently by Fiona Hyslop.”
2. The Ministers responded to Mr Birt on 26 June 2013. They confirmed that they had received legal advice from the Law Officers on this subject, but relied on sections 29(1)(c) and 36(1) of FOISA to withhold the information. The Ministers were of the view that the public interest favoured withholding the information.
3. On 26 June 2013, Mr Birt wrote to the Ministers requesting a review of their decision. He provided public interest arguments in favour of disclosure, submitting that the people of Scotland:



- a. did not have the resources of the Government, yet were being asked to carry out a reasonable judgement at the referendum that would determine their future for many generations
 - b. must be given due respect and empowerment by the Government, in which they had placed their trust, and be provided with the legal basis for relations with the EU following a “Yes” vote
 - c. had funded this legal advice, and the Scottish Government must answer to them.
4. The Ministers notified Mr Birt of the outcome of their review on 5 August 2013. They confirmed that they had considered Mr Birt’s public interest arguments, but upheld their original decision without modification. They believed the public interest in disclosure would be met to a significant extent by the publication of their White Paper on independence (which would reflect the legal advice they had received) later in 2013.
 5. On 8 August 2013, Mr Birt 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 Birt 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 22 August 2013, the Ministers were notified in writing that an application had been received from Mr Birt and were asked to provide the Commissioner with the information withheld from him. In response, the Ministers confirmed that the withheld information was the same as that under consideration in another case (now the subject of *Decision 235/2013 Mr Mark McLaughlin and the Scottish Ministers*¹), and so they wished to rely on the same arguments as they had presented in that case.
8. Following the issue of *Decision 235/2013*, which accepted that the Ministers were entitled to withhold the information under section 29(1)(c) of FOISA, Mr Birt confirmed that he wished the Commissioner to make a decision in his particular case. He provided further arguments (which are summarised below) in favour of disclosure.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2013/201301497.aspx>



Commissioner's analysis and findings

9. 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 Birt and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 29(1)(c) of FOISA

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 definition of "the Law Officers" in section 29(4) includes the Lord Advocate and the Solicitor General for Scotland.
11. The Commissioner is satisfied that the information withheld from Mr Birt relates to a request for the provision of advice by the Law Officers and also to the provision of that advice. The information is therefore exempt from disclosure under section 29(1)(c) of FOISA.

The public interest test

12. Section 29(1)(c) is a qualified exemption, which means that, even if the exemption applies, its application is subject to the public interest test set out in section 2(1)(b) of FOISA. The Commissioner must therefore 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.
13. In his application, Mr Birt highlighted the importance of the independence referendum. The application concluded as follows:
- I would urge you [the Commissioner] to please reconsider the decision not to overturn the original rejection on the grounds that the public interest in this matter is of the highest importance, that this public interest overrides all other considerations in this regard as the decision being asked of the Scottish people is so serious a matter that no information should be withheld.*
14. Following the issue of *Decision 235/2013*, Mr Birt submitted that the legal advice was obtained using what essentially was taxpayers' money. Consequently, he believed the Ministers should allow the public to see the fruit of such expenditure, "regardless of the particular legal aspects of the case". The public should be allowed to "take the advice which has been dispensed at face value, and not 'sanitised' in a white paper or other such incarnation". He did not believe the public interest in withholding the information to have been adequately articulated, and did not accept that making legal advice public necessarily led to such advice being poorer or more circumspect.
15. The Ministers' arguments are summarised in *Decision 235/2013*. The Commissioner does not consider it necessary to repeat them here. Mr Birt's request relates to the same information as was requested in that case. Mr Birt and Mr McLaughlin both made their requests at around the same time (i.e. within five days of each other).



16. As stated in that previous decision, the Commissioner accepts that there is a significant public interest in disclosure of the advice requested in this case. However, as that decision also makes clear, it does not necessarily follow from this that there might not be equally strong, or stronger, arguments for maintaining the exemption.
17. In *Decision 235/2013*, the Commissioner referred to the strong public interest in maintaining (i) more generally, the right to confidentiality of communications between legal adviser and client, and (ii) specifically, the Law Officer convention. As should be clear from the decision, these are strong public interest considerations recognised by the higher courts across the United Kingdom, not simply by this Commissioner.
18. *Decision 235/2013* also attached considerable weight to the Ministers' commitment to setting out their position on EU membership in the forthcoming White Paper on independence. As indicated above, Mr Birt believed there was a particular value in having access to the legal provided "at face value", and not "sanitised" in a white paper or other such publication.
19. As the Commissioner has noted previously, when she receives an application and comes to a decision as to whether the public authority complied with Part 1 of FOISA in responding to the request, she must consider the position as at the time the public authority issued its response to the request for review (see paragraph 31 of the opinion of the Lord President in *The Scottish Ministers v The Scottish Information Commissioner* [2006] CSIH 8)². In this instance, Mr Birt was notified of the outcome of the review on 5 August 2013. In Mr McLaughlin's case, the outcome of the review was communicated to him on 26 June 2013.
20. The Commissioner has considered Mr Birt's arguments carefully. The only difference between the circumstances of his request and application and those of Mr McLaughlin's would appear to be that the outcome of Mr Birt's review was communicated to him approximately six weeks after that of Mr McLaughlin's. She is not persuaded that anything occurring in that intervening period made the public interest arguments for disclosure any more compelling, or those for maintaining the exemption any less so.
21. As the Commissioner concluded in *Decision 235/2013*, section 29(1)(c) clearly creates an expectation that requests for advice to, and advice received from, the Law Officers should be protected under FOISA. There, she acknowledged that such requests would usually relate to matters of particular sensitivity and considered it in the public interest for Ministers to be able to seek and receive such advice in confidence. She notes that this is a conclusion Mr Birt does not accept, but she cannot accept that he has given her any reasonable basis for reaching a different conclusion. She would reiterate that the relevant confidentiality arguments derive from the wider jurisprudence of the courts and not simply from her own decisions.

² <http://www.scotcourts.gov.uk/opinions/2007CSIH08.html>

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22. Having considered the competing arguments for and against disclosure in this case, the Commissioner is not persuaded that there is an overriding public interest in the disclosure of the information withheld from Mr Birt. In her view, the considerations identified in Decision 235/2013 remain relevant, in particular the Ministers' commitment to setting out their position on EU membership in the forthcoming White Paper on independence.
23. 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 were entitled to withhold the legal advice from Mr Birt.
24. Having reached this conclusion, the Commissioner has not gone on to consider the remaining exemption (section 36(1) of FOISA) 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 Birt.

Appeal

Should either Mr Birt 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.

Margaret Keyse
Head of Enforcement
22 November 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-

...

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

...

- (4) In this section-

...

"the Law Officers" means 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; ...

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