



Scotland Office

An Oifis Albannach

Scotland Office
1 Melville Crescent
Edinburgh EH3 7HW

For the attention of Mr Wyllie.

Telephone: 0131-244 9066
Website: www.scotlandoffice.gov.uk

30 March 2010

Dear Mr Wyllie,

SCOTLAND OFFICE FREEDOM OF INFORMATION REQUEST

Thank you for your email of 30 January 2010 requesting an internal review of the Scotland Office's decision in respect of your request for information by email dated 31 December 2009. I am sorry that you have not had a substantive response earlier. You requested the following:

Please provide me with information about the Scotland Office's communications with the Department of Culture, Media and Sport on the application of the Digital Economy Bill to Scotland that took place in 2008 and 2009.

Such information should extend to copies of minutes, memoranda and correspondence, in an electronic format.

Under the Freedom of Information Act 2000 you are entitled

- to be told whether or not the public authority you apply to holds the information you request, and
- to have that information released to you, unless one or more exemptions under the Act apply to it, and, in the case of certain exemptions, the public interest in withholding the information outweighs the public interest in releasing it.

The public authority must comply with these obligations under the Act promptly and no later than the twentieth working day following the receipt of the request. It is also the duty of the public authority to provide advice and assistance to the requestor.

The Scotland Office responded to your letter on 29 January 2010. The letter explained the function of the Scotland Office in relation to UK Parliament legislation and provided you with information about the Sewel Convention. It also informed you that the Digital Economy Bill relates to a reserved matter.

The Scotland Office letter of 29 January confirmed that the Office does hold information falling within the scope of your request. However the Office considered that the information was exempt under section 35 and section 42 of the Freedom of Information Act. The letter explained that "section 35 relates to policy formulation and section 42 relates to legal advice". It proceeded to state that both exemptions are subject to the public interest test and that in the case of the information in question the public interest in maintaining the exemptions outweighed the public interest in disclosing the information.

On 30 January 2010 you emailed the Scotland Office to request an internal review of the Office's handling of your request. Your full and helpful letter

- stated that your request did not relate to "any communication containing legal advice";
- provided your view of section 35 and of the public interest arguments engaged by the material falling within the scope of that section;
- stated that your request "does not extend whatsoever to any proceeding since the [Digital Economy] Bill was laid before the House"; and
- provided helpful references to the answer to a House of Commons written Parliamentary question, and also to the whatdotheyknow.com website

I have considered your request for an internal review of the decision to your original request. Firstly as far as the Scotland Office's obligations under the Freedom of Information Act 2000 Part I are concerned the Office provided you with a substantive response on the nineteenth working day following the date of receipt of your request. It did not provide you with advice and assistance after the receipt of your request, but since your request was precise and unambiguous, and there was no question of the cost of searching for the information exceeding the appropriate limit, that was not necessary. The Scotland Office letter of 29 January provided you with some background information on the role of the Office in relation to the Sewel Convention. The letter of 29 January also complied with the obligation under the Act to inform you whether or not the Office holds any information falling within the scope of the request.

I now turn to the application of exemptions under Part II of the Freedom of Information Act. As you requested in your email of 30 January I have excluded from consideration "any communication containing legal advice". This narrows the scope of your request and reduces the amount of information that falls within it. The question then is whether the other information within the scope of your request properly falls within section 35. Section 35 covers information held by a government department relating to

- S 35 (1) (a) the formulation or development of government policy
- S 35 (1) (b) Ministerial communications
- S 35 (1) (c) the provision of advice by any of the Law Officers, or any request for the provision of such advice, or
- S 35 (1) (d) the operation of any Ministerial private office.

I have considered the information within the scope of your redefined request, that is to say information other than legal advice, and I am view that it is information which relates

- to the formulation or development of government policy or
- to Ministerial communications.

The exemptions at s 35(1)(a) and s 35(1)(b) are therefore properly engaged by your redefined request.

Section 35(2) of the Act stipulates that once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of

the decision is not to be regarded as exempt under s 35 (1) (a) or under s 35 (1) (b). None of the information in question constitutes statistical information.

The Scotland Office letter of 29 January argued that the public interest in access to information and clearer understanding of the policy making process must be balanced against “both the timing of any request and the need to carefully consider the space within which officials consider matters of policy, provide advice and consider options”. My review has led me to the conclusion that this description of the public interest test appears to contain two errors. Firstly I assume that the first use of the word “consider” is a typing error, and the sentence should have read “... to preserve carefully the space ...”. For the purposes of this discussion I will assume that this is what it did say. Secondly the description refers only to policy making space used by officials. It does not refer to Ministers, and as I have noted above some of the information in scope relates to Ministerial communications.

The Freedom of Information Act s 35(4) requires that, in making any determination of the public interest for information which is exempt under s 35(1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking. The information exempt under s 35(1)(a) contains three items of factual information. These items are not necessarily background to decision taking, but nevertheless I consider that the public interest in disclosing them outweighs the public interest in withholding them. They are

- (1) a list of materials providing background to the Digital Economy Bill,
- (2) a description of the role of the Office of the Solicitor to the Advocate General in relation to the Sewel convention, and
- (3) a description of the role of the territorial offices in relation to UK legislation.

Copies of these three items are annexed to this letter.

In relation to the other items of information within the scope of your request and subject to the exemption at s 35(1)(a) and s 35(1)(b) I have come to the view that the original decision of the Scotland Office that the public interest in withholding the information outweighs the public interest in disclosing it was correct. In coming to this decision I have considered carefully both the information itself and the arguments you advanced in your email of 29 January.

In that email you argue that there is a public interest in ensuring the efficiency and effectiveness of the Scotland Office. You then proceed to say that

- disclosing information about Scotland Office’s communications with the Department of Culture, Media and Sport on the application of the Digital Economy Bill to Scotland will ensure that the voice of the Scotland Office is heard louder within Government, and that
- the convention of collective responsibility is not relevant to the information in question and that releasing the information will ensure the policy formulation process works properly.

We very much share your view that there is a public interest in ensuring the efficiency and effectiveness of the Scotland Office. However I do not accept your other contentions. It is central to the efficient and effective formulation and development of Government policy, and the constitutional conventions that support policy making, particularly the convention of collective responsibility, that the process of policy formulation and development takes place within a protected space. However once a settled position has been agreed by Ministers all Government Ministers are collectively responsible for the position. They are responsible for that position to Parliament and to the electorate. They are not accountable for any positions they or their officials may have advanced in the earlier stages of policy development prior to

a collective decision. If information relating to policy development were disclosed routinely the voice of the Scotland Office and of other departments would not be heard louder. Rather the process of policy formulation and development would be likely to deteriorate. Less information and internal discussion would be recorded and the quality of policy making and decision would diminish because it would be based on inadequate discussion and information. Once a decision has been made, in this case about the form of the Digital Economy Bill, members of the public can examine it and take a view as to whether it represents sound policy. There is a very strong public interest in protecting the policy development process within Government and the convention of collective responsibility. From my examination of the papers in question I do not think they contain other information whose disclosure would serve a greater public interest.

You then state "the Scotland Office is to be judged by how it articulates its arguments. The only way in which this can be seen is through examining the development of policy." Scotland Office Ministers articulate the collective view of the Government on devolution policy and other matters relating to Scotland through a range of speeches and publications. These are most readily available for examination on the Scotland Office website <http://www.scotlandoffice.gov.uk/>.

You then argue that "there is a public interest in ensuring public awareness and debate in the role of the Scotland Office and the Digital Economy Bill". You also argue that "where public funds are being spent, there is a strong interest in accountability and justification". Two of the three items of factual information I am releasing to you with this letter provide information about the role of the Scotland Office in relation to legislation. The question then is whether the other specific information in these papers is of such relevance to these public interests that its release would outweigh the public interest in preserving the policy making process and the confidentiality of Ministerial communications. I do not believe it would. Further information about the role of the Scotland Office in relation to legislation in the UK Parliament can be found not only on the Scotland Office website, but in the Office's annual report and in the Scottish Affairs Committee's annual hearing on the report. (The transcript of the most recent hearing of July 2009 is at <http://www.publications.parliament.uk/pa/cm200809/cmselect/cmsscotaf/123/9070801.htm>.)

Your letter also argues that the section 35 "exemption must be one applied based on harm. There was no indication in the letter I received that harm to individuals would ensue from disclosure." I have considered the information in the light of this argument, but do not think it relevant. Some of the exemptions in the FOI Act only apply if it is considered that disclosure of information under the Act would prejudice, or be likely to prejudice, certain interests. That is not the case with section 35. The exemption applies if the information relates to certain classes of information, in this case the formulation or development of government policy or Ministerial communications. The question of harm can however be relevant to the public interest test. The harm that may be caused by disclosure need not be confined to harm to individuals. In the case of this information it relates to harm to the policy making process and associated constitutional conventions. As you rightly note had it been considered that disclosure under the Act would or would be likely to prejudice the commercial interests of any person the information would also be exempt under section 43.

Finally you write that your request does not "extend whatsoever to any proceedings since the Bill was laid before the House". The Digital Economy Bill received its first reading in the House of Commons on 16 March 2010. This internal review is concerned with the handling of your request of 31 December 2009.

I hope you find this letter and the annexed information being released to you helpful and informative. If you are not content with the outcome of this internal review you have the right to apply directly to the Information Commissioner for a decision. The contact details are:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Yours sincerely

Gervase Hood
Scotland Office

1) the DCMS site containing the consultation document and related documents.

http://www.culture.gov.uk/reference_library/consultations/5345.aspx/

2) the House of Commons Report entitled "Harmful content on the Internet and in video games"

<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmcmums/353/353.pdf>

3) the Europa site for Directive 98/34/EC

http://ec.europa.eu/enterprise/standards_policy/vademecum/doc/98_34_ec_consolidated_version.pdf

4) Prof Tanya Byron's review -

<http://www.dcsf.gov.uk/byronreview/pdfs/Final%20Report%20Bookmarked.pdf>

1) The High court judgment of "(1) Interfact Ltd and (2) Pabo Ltd -v- Liverpool City Council" [2005] 1 WLR 3118

2) The Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee and the Committee of the Regions on the protection of consumers, in particular minors, in respect of the use of video games, (dated 22.04.2008).

3) The Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry (2006/952/EC)

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OSAG (<http://www.oag.gov.uk/oag/34.23.24.html>) -HMG's lawyers on Scots law, who will advise on what aspects of your Bill trigger the Sewel Convention (if any) and what aspects need 'Scottifying'. OSAG only work for HMG and not the Scottish Government (SG)-so please share background details and any Bill prints you have with them. You will need to get advice from OSAG before contacting the SG. The Scotland Act 1998 sets out the framework for devolution in Scotland and lists all matters which are reserved to the UK Parliament-those matters include broadband, wireless communications and competition legislation. OSAG will advise whether your Bill falls within the subject matter of these reservations. All other matters are devolved to the Scottish Parliament by default.

Attached is basic timeline which highlights some of the 'Scottish' issues you will need to address. The following also outlines a few constitutional hoops you will need to jump through:

The Sewel Convention: provides that the UK Parliament will not normally legislate without the consent of the Scottish Parliament:

- in a devolved area
- to alter the competence of the Scottish Ministers (reserved or devolved function they may exercise)
- to alter the competence of the Scottish Parliament (this bill shouldn't do this)

If Required, the consent of the Scottish Parliament is given by way of a Legislative Consent Motion (LCM) which are tabled by the Scottish Ministers in the Scottish Parliament once a UK Bill has been introduced at Westminster (with one or more of the trigger listed above). An LCM covers specific devolved issues in a Bill and not consent for the Bill as a whole.

If OSAG advise that the Bill does engage the Sewel Convention and requires an LCM: You will need to agree with officials in the SG that the Bill should extend to Scotland on devolved matters. If SG officials agree, prior to introduction and L Committee your Minister should write to the relevant Minister in SG seeking their agreement to support an LCM. If necessary we can put you in touch with SG officials do a first draft of the letter.

If the SG Ministers do support the LCM you will need to work with OSAG and the SG officials to make sure they are happy with the way in which the Bill is drafted (as regards Scotland) before introduction and during as regards amendments.

Scottification'

If OSAG advise that the Bill does not require an LCM you do not need the consent of the Scottish Parliament or Scottish Ministers. You will however need to still work with OSAG to ensure that the Bill is 'Scottified' i.e. so it works with Scots law (e.g. references to different legislation, courts, etc). There is possibility that this Bill may require an LCM and include reserved aspects that need 'Scottifying'.

Following on from our chat just now, I am writing on behalf of the Territorial Offices (Scotland, Wales and Northern Ireland Offices). The Territorial Offices are part of the UK Government, leading on inter-administration relations with those parts of the UK that have a devolved Parliament/ Assembly.

What this means for you

The devolution implications of your legislation should be considered at the earliest opportunity with the respective Territorial Office. Each Devolved Administration has separate responsibilities and areas of competence, the Government

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is committed to respecting all three separate devolution settlements in any legislative proposals it brings forward. It will be important to maintain contact with the Territorial Offices as your proposals develop, and as instructions and clauses emerge.

You will also need to ensure that you have engaged appropriately with the Devolved Administrations. The Territorial Offices can provide advice on engagement and appropriate handling preparations prior to introduction.

L Committee clearance

L Secretariat will expect you to engage with the Territorial Offices throughout the development of your Bill. All Bills going before L Committee for clearance must not have any outstanding devolution issues and if these remain unresolved clearance can be refused.

Finally, the documents that you produce to support your draft Bill will need to make reference to Territorial Extent and devolution implications. Again - this is something we in the Territorial Offices can provide you with template text for.

The Role of the Scotland Office

The Sewel Convention is the Government's commitment to not normally legislate on devolved matters without first getting the consent of the Scottish Parliament.

Any UK Bill that introduces legislation:

- for a devolved purpose i.e. on a matter on which the Scottish Parliament could legislate;
- to vary the legislative competence of the Scottish Parliament;
- to confer functions either in reserved or devolved areas on the Scottish Ministers

will require a Legislative Consent Motion to be passed in the Scottish Parliament.

The Constitutional Policy Branch of the Scotland Office is here to advise and liaise with UK Bill Teams and their Scottish Executive counterparts. With our colleagues in the Office of the Solicitor to the Advocate General (OSAG) (Jim Logie copied here), we can advise on whether provisions in Bills or draft Bills trigger the Sewel Convention and put you in contact with colleagues north of the border when necessary. We will also need to make sure that your Bill is 'Scottified' so that it works with Scots law (different courts, etc). I will be your lead contact in the Scotland Office.

The Role of the Northern Ireland Office

The UK Government will not normally legislate with regard to devolved matters without the agreement of the Northern Ireland Assembly. The Assembly is responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government. The approach should be made to the Northern Ireland Minister with lead responsibility for the policy area.

The Legislation and Parliamentary Unit of the Northern Ireland Office can help UK Bill Teams liaise with their Northern Ireland Administration counterparts and advise whether provisions in Bills or draft Bills are likely to need a Legislative Consent Motion. John Todd and David Coleman are your contacts in the Northern Ireland Office (copied above).

It is worth noting that the Secretary of State for Northern Ireland has a role in respect of a number of reserved and excepted matters. Therefore the Northern Ireland Office should always be consulted at an early stage when developing any legislative proposals which could be relevant to Northern Ireland.

The Role of the Wales Office

Following the coming into force of the Government of Wales Act 2006, the National Assembly for Wales now has the power to pass primary legislation by way of "Assembly Measures". Despite these new powers the incremental nature of the Welsh devolution settlement means that the UK Government's legislative programme is hugely important to Wales. Parliamentary Bills need to be drafted so as to reflect Welsh interests and there are three areas that Bill teams need to be aware when preparing their Bills:

- England and Wales clauses (where provisions apply equally in England and Wales);
- Wales only clauses; and
- Framework clauses (broadly drafted clauses which confer legislative competence on the National Assembly).

The Wales Office legislation team is available to advise UK Bill teams on the Welsh devolution settlement and to help facilitate discussions with colleagues in the Welsh Assembly Government.