



Mr Neil Lovatt

Sent via email to:
(request-404701-722137a9@whatdotheyknow.com)

Our ref: FOI/17/01056
30 June 2017

Dear Mr Lovatt

Response to request for review of original response

Further to my letter of 5 June 2017, I have now completed my review of our response to your request under the Freedom of Information (Scotland) Act 2002 (FOISA).

You originally asked for:

"Can you provide details of any investigation or analysis completed by the Scottish Government, including requests and dialogue with the UK government, in respect of the Scottish Government's legal ability to make discretionary new welfare benefits (under Section 28 or the 2016 Scotland Act) where these are paid to individuals before state pension age?

Additionally and separately can you provide the details of any investigation or analysis completed by the Scottish Government specifically in regards their legal ability to compensate women through the use of the welfare powers conferred under the Scotland Act who have lost out financially as a result of the recent changes to the state pension age announced by the U.K. Government."

I appreciate that when you asked for a review of this decision you also clarified your request by highlighting information previously released and stating that you felt that "Given that Stephen Kerr stated that they cannot provide such benefits before UK state pension age there must have been some analysis of this issue and I would respectfully request access to that evidence and analysis".

I have concluded that the original decision should be confirmed, with modifications.

The outcome of my review falls into two stages. First, I have found that the exemption under section 29(1)(c) 'advice by Law Officers' was incorrectly applied to some of the information falling within the scope of your request. I apologise for any confusion that may have resulted from the incorrect use of this exemption which did not apply to any of the information requested. Instead, I have concluded that the exemption under section 36(1) of FOISA



(confidentiality in legal proceedings) applies to some of the information requested because it is legal advice and disclosure would breach legal professional privilege.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is some public interest in release as part of open and transparent government, and to inform public debate. However, this is outweighed by the strong public interest in maintaining the right to confidentiality of communications between legal advisers and clients, to ensure that Ministers and officials are able to receive legal advice in confidence, like any other public or private organisation.

I have also found that the exemption under section 29(1)(b) of FOISA (Ministerial communications) was wrongly applied to some of the information falling within the scope of your request. Again I apologise for any confusion that may have resulted from the incorrect use of this exemption. Instead, the exemption under section 29(1)(a) of FOISA (formulation or development of government policy) applies to some of the information requested because it relates to the development of the Scottish Government's policy on welfare spending.

Secondly, I have gone on to consider whether any exemptions apply to the remaining withheld information. I have concluded that the remaining information was correctly withheld under sections 29(1)(a), 30(b)(i) and 30(b)(ii) of FOISA. However, the original response letter failed to adequately apply these exemptions. I shall therefore apply these exemptions, applying the public interest test.

An exemption under section 29(1)(a) of FOISA (formulation or development of government policy) applies to some of the information requested because it relates to the development of the Scottish Government's policy on welfare spending.

This exemption is subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying the exemption. We have found that, on balance, the public interest lies in favour of upholding the exemption. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in high quality policy and decision-making, and in the properly considered implementation and development of policies and decisions. This means that Ministers and officials need to be able to consider all available options and to debate those rigorously, to fully understand their possible implications. Their candour in doing so will be affected by their assessment of whether the discussions on welfare spending will be disclosed in the near future, when it may undermine or constrain the Government's view on that policy while it is still under discussion and development.

Exemptions under sections 30(b)(i) and 30(b)(ii) of FOISA (free and frank advice and exchange of views) apply to some of the information requested. These exemptions apply because disclosure would, or would be likely to, inhibit substantially the free and frank provision of advice and exchange of views for the purposes of deliberation. These exemptions recognise the need for officials to have a private space within which to provide free and frank advice to Ministers and other officials, and to discuss and explore options, before the Scottish Government reaches a settled public view. Disclosing the content of free and frank advice and discussions on welfare spending will substantially inhibit the provision

of such advice in the future, particularly because these discussions relate to a sensitive issue such as welfare spending.

These exemptions are subject to the 'public interest test'. Therefore, taking account of all the circumstances of this case, we have considered if the public interest in disclosing the information outweighs the public interest in applying these exemptions. We have found that, on balance, the public interest lies in favour of upholding the exemptions. We recognise that there is a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. However, there is a greater public interest in allowing Ministers and officials a private space within which to explore and refine the Government's policy position on welfare spending, and within which officials can provide full and frank advice, until the Government as a whole can adopt a policy that is sound and likely to be effective. This private thinking space is essential to enable all options to be considered, based on the best available advice, so that good policy decisions can be taken. Premature disclosure is likely to undermine the full and frank discussion of issues between Ministers and officials, which in turn will undermine the quality of the decision making process, which would not be in the public interest.

In addition you have asked for clarification on:

"attachment

<https://www.whatdotheyknow.com/request/404701/response/986274/attach/html/6/Fol%20Document%203%202.pdf.html>

and

<https://www.whatdotheyknow.com/request/404701/response/986274/attach/html/7/Fol%20Document%204%202.pdf.html>

Are identical other than one piece of redaction therefore I would like clarification if this was an error."

I can also confirm that releasing the two pieces of information you have highlighted was not an error. Please note that while the information may appear similar it was in fact two different emails, as you can see from the dates and times of the items being sent.

If you are unhappy with the outcome of this review you have the right to appeal to the Scottish Information Commissioner about our decision within 6 months of receiving this letter. Information on how to make an appeal, along with an application form, is available on the Commissioner's website at:

<http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>. You can also contact the Commissioner at:

The Scottish Information Commissioner
Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS

E-mail: enquiries@itspublicknowledge.info
Telephone: 01334 464610

Should you then wish to appeal against the Commissioner's decision, there is a right of appeal to the Court of Session on a point of law only.

Yours sincerely,



CATHERINE MCKENNA
Policy Officer