

Decision Notice

Decision 068/2016: Mr Andrew Picken and the Scottish Ministers

Communications between the Permanent Secretary and former First Minister about the manuscript for: “The Dream Shall Never Die”

Reference No: 201501845

Decision Date: 21 March 2016



Scottish Information
Commissioner

Summary

On 8 August 2015, Mr Picken asked the Scottish Ministers (the Ministers) for communications between the Permanent Secretary and former First Minister, Alex Salmond, concerning Mr Salmond's book "The Dream Shall Never Die".

The Ministers withheld the information under various exemptions in FOISA.

The Commissioner found that the Ministers partially failed to respond to Mr Picken's request in accordance with Part 1 of FOISA. The Commissioner did not accept that all of the information could be withheld under section 30(c) of FOISA. She ordered the Ministers to disclose the information incorrectly withheld.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 30(c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 8 August 2015, Mr Picken made a request to the Ministers for all recorded communications between the relevant Permanent Secretary and the former First Minister Alex Salmond regarding Mr Salmond's book "The Dream Shall Never Die".
2. The Ministers did not respond. On 22 September 2015, Mr Picken wrote to the Ministers requiring a review in respect of their failure to respond.
3. The Ministers notified Mr Picken of the outcome of their review on 2 October 2015. They confirmed that Mr Salmond had submitted a draft manuscript of his book to the Permanent Secretary, in accordance with paragraph 10.14 of the Scottish Ministerial Code¹. They informed Mr Picken that the information was exempt from disclosure in its entirety in terms of sections 30(c) of FOISA (Prejudice to effective conduct of public affairs). Additionally, they withheld some of the information under sections 36(2) (Confidentiality) and 38(1)(b) (Personal information) of FOISA.
4. On 7 October 2015, Mr Picken wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Picken stated he was dissatisfied with the outcome of the Ministers' review because he considered the public interest favoured disclosure of the information.

¹ <http://www.gov.scot/Publications/2015/06/2562/11>

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Picken made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
6. On 22 October 2015, the Ministers were notified in writing that Mr Picken had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Picken. They provided the information and the case was allocated to an investigating officer.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and answer specific questions, focusing on the application of the exemptions cited in their response to Mr Picken.

Commissioner's analysis and findings

8. 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 Picken and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 30(c) – Prejudice to effective conduct of public affairs

9. Section 30(c) of FOISA exempts information if its disclosure “would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs”. The word “otherwise” distinguishes the harm required from that envisaged by the exemptions in section 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority applying it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
10. There is a high threshold to be crossed in applying the tests contained in the section 30(c) exemption. The prejudice must be substantial, and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into account the actual content of the information and all other relevant circumstances (which may include the timing of the request).
11. The Ministers noted that paragraph 10.14 of the Scottish Ministerial Code requires former Ministers intending to publish their memoirs to submit the draft manuscript to the Permanent Secretary and to conform to the principles set out in the Radcliffe Report of 1976 (the Radcliffe Rules). The Ministers also noted that the relevant parts of the Radcliffe Report entitled “Ministerial Memoirs: The Radcliffe Rules and their application” are set out on page 41 of the Directory of Civil Service Guidance, Volume 2: Collected Guidance²: they explained the Mr Picken had been given a link to these.

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/60997/guide-civil-service-guidance-volume-2_0.pdf

12. The Ministers stated that the Radcliffe Rules make it clear that former Ministers should submit the manuscript of their memoirs to the Permanent Secretary of the Scottish Government. Thereafter, the Permanent Secretary is obliged to examine the manuscript in respect of national security and the preservation of international relationships, notify the author of any objections and offer views on the treatment of confidentiality relationships in the manuscript.
13. In this case, the Ministers applied the exemption in section 30(c) to correspondence from the Permanent Secretary to Mr Salmond where the Permanent Secretary raised a number of points about the manuscript.
14. The Ministers submitted that the Radcliffe Rules provide a safe, private and confidential space for a former Minister to seek the views and opinions of the Permanent Secretary and, in turn, for such views and opinions to be provided to the former Minister. In their view, disclosure of these exchanges would remove that safe space. The role of the rules would be defeated by disclosure of information which might, for example, damage national security, or which provides views or objections in relation to such information. In the Ministers' view, this could not only undermine the principles of the Radcliffe Rules, but render them potentially unworkable.
15. The Ministers argued that in order for the Radcliffe Rules to operate effectively, it is important for the Permanent Secretary and the former Minister to have the private space to allow frank, confidential discussions about the contents of the former Minister's memoirs. In their view, in order for the Permanent Secretary to fulfil their duties under the Radcliffe Rules, it is necessary for the Permanent Secretary to be able to set out any section in the draft which they believe should be removed or more sensitively worded.
16. In the Ministers' view, in order for the Radcliffe rules to operate effectively, it is important that the Permanent Secretary can raise points they consider should be amended or removed from a book before publication, without these comments being disclosed subsequently via an FOI request. The Ministers submitted to do so would likely cause even greater harm than if they were included in the book, as disclosure of such information would draw particular attention to them.
17. The Ministers noted that the Permanent Secretary had set out his views about the text within the correspondence with Mr Salmond. In the Ministers' view, his comments on each point provided additional reasons why disclosure of each point would be likely to substantially prejudice the effective conduct of public affairs.
18. In conclusion, the Ministers submitted that disclosure of the information would be likely to cause significant harm to the smooth running of Government. Firstly, they considered it would be likely to harm the trust between former Ministers and the Permanent Secretary, and the freedom of the current (or future) Permanent Secretary to give detailed comments or concerns about aspects of draft books in similar cases in future. Secondly, in the current case, they considered disclosure would significantly harm the smooth running of the Scottish Government, by placing in the public domain information which the then Permanent Secretary believed should not be included in the book, with the reasons for his views.
19. Mr Picken did not provide any specific submissions regarding the Ministers' application of this exemption.
20. The Commissioner has considered the nature and content of the withheld information, along with the Ministers' submissions.

21. In this case, the Commissioner accepts that disclosing the specific parts of the correspondence which concern the former Permanent Secretary's views, comments and suggestions about particular parts of the draft manuscript would be likely to cause substantial prejudice to the effective conduct of public affairs.
22. The Commissioner accepts that the well-established principles of the Radcliffe Rules would likely be compromised by disclosure of information of this nature. She is persuaded by the Ministers' arguments describing the effect of disclosure on relationship of trust between the Permanent Secretary and former Ministers. She also agrees that disclosure of this information would curtail the ability of any Permanent Secretary to provide detailed comments on draft memoirs in future.
23. In all the circumstances, the Commissioner accepts that the Ministers were correct to apply the exemption in section 30(c) of FOISA to this particular information.
24. The Commissioner does not accept that the exception is engaged in relation to all of the correspondence withheld by the Ministers. She accepts that the exemption was correctly applied to those sections of the correspondence containing the Permanent Secretary's views and comments on the draft manuscript. However, given the nature of the opening and closing remarks, the Commissioner does not accept that their disclosure would cause the prejudice to the effective conduct of public affairs claimed.
25. In the circumstances, the Commissioner cannot accept that disclosure of these parts of the correspondence would, or would be likely to, prejudice substantially the effective conduct of public affairs. Having considered all of the relevant submissions, therefore, the Commissioner does not accept that the Ministers were correct to withhold this information under the exemption in section 30(c) of FOISA. As no other exemptions have been applied to this particular information, the Commissioner now requires the Ministers to disclose it to Mr Picken.
26. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. For the information she has accepted as exempt, the Commissioner must, therefore, go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

The public interest

27. The Ministers considered there to be a stronger public interest in withholding the information, in order to avoid disclosing information which the Permanent Secretary had proposed should not be included in the book. They identified a strong public interest in upholding the effectiveness of the long-standing Radcliffe Rules, by ensuring that comments made by Permanent Secretaries (where they raised concerns about particular points in a manuscript) were kept confidential.
28. The Ministers submitted there was little public interest in disclosing information which the Permanent Secretary had identified as being inappropriate to include. The Ministers also considered there was a strong public interest in withholding information in order to safeguard the trust between Permanent Secretaries and former Ministers, so they would be able to ask questions and provide comments without concern that these would be disclosed.
29. Mr Picken considered the public interest favoured disclosure, or partial disclosure, of information which would give an indication of the content of the manuscript which was queried by the Permanent Secretary. Mr Picken was not satisfied that the Ministers had

provided any competing arguments as to why the public interest would be served either by withholding or disclosing the information.

30. The Commissioner accepts there is a general public interest in transparency and accountability, particularly involving matters of recent political and historical significance.
31. Nevertheless, the Commissioner also acknowledges the risk of substantial prejudice to the effective conduct of public affairs in this case, with particular reference to the detrimental effect of disclosure on the relationship of openness and confidence between Permanent Secretaries and former Ministers.
32. The Commissioner considers there is a strong public interest in ensuring the principles of the Radcliffe Rules are maintained and allowed to operate effectively in future. In her view, disclosure of the information in this case, comprising the Permanent Secretary's views and comments on the manuscript, would jeopardise the effectiveness of these well-established arrangements: that would not be in the public interest.
33. On balance, having taken account of all the submissions before her, the Commissioner considers the public interest in maintaining the exemption in relation to this information outweighs that in disclosing it.
34. The Commissioner therefore finds that the Ministers were entitled to withhold this information under section 30(c) of FOISA. As the Commissioner has determined that the Ministers were entitled to withhold the information under this exemption, she is not required to consider the application of sections 36(2) and 38(1)(b) of FOISA to the same information.
35. With this decision, the Commissioner will provide the Ministers with a marked up copy of the information, indicating the information that should be disclosed.

Decision

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

The Commissioner finds that the Ministers were entitled to withhold some information under section 30(c) of FOISA, but wrongly applied the same exemption to the remaining information.

The Commissioner requires the Ministers to disclose the information highlighted in the accompanying letter to this decision by **5 May 2016**.

Appeal

Should either Mr Picken 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.

Enforcement

If the Scottish Ministers (the Ministers) fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner

21 March 2016

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.

...

30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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