

Decision Notice

Decision 130/2017: Mr Gareth Rose and the Scottish Ministers

Investment in Scotland by the Qatari Government

Reference No: 201700548

Decision Date: 9 August 2017



Scottish Information
Commissioner

Summary

The Ministers were asked for correspondence, reports and other documents relating to investment in Scotland by the Qatari government, including details of meetings between the two governments.

The Ministers disclosed some information and withheld the remainder under a number of exemptions in FOISA. After being asked to review their reliance on one exemption (section 29(1)(a) of FOISA), the Ministers substituted a different exemption (section 30(c) of FOISA) in relation to one line in a document.

Following an investigation, the Commissioner agreed that the Ministers had been entitled to withhold the information in question.

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 the effective conduct of 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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 24 November 2016, Mr Rose asked the Scottish Ministers (the Ministers) for all correspondence, reports and other documents relating to investment in Scotland by the Qatari government. He asked for details of any meetings held between the Scottish and Qatari governments in the last two years, including dates, locations, and names of people present at the meeting.
2. The Ministers responded on 8 February 2017. They disclosed some information and withheld the remainder under a number of exemptions in FOISA, including section 29(1)(a) of FOISA which can apply to information which relates to the formulation or development of government policy.
3. On 9 February 2017, Mr Rose emailed the Ministers requesting a review of their decision. He did not accept that all of the information withheld under section 29(1)(a) of FOISA related to the formulation of government policy, arguing that this only applied to information "at the early stages of the policy process".
4. The Ministers notified Mr Rose of the outcome of their review on 8 March 2017. They stated that section 29(1)(a) of FOISA had been incorrectly applied to information in one document and they were now relying upon section 30(c) of FOISA (prejudice to effective conduct of public affairs) to withhold this information.
5. On 21 March 2017, Mr Rose applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He asked the Commissioner to decide whether the withheld information met

“the higher bar of substantial prejudice” (i.e. the harm test required by the exemption in section 30(c)).

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Rose made a request for information to a Scottish public authority and asked the authority to review their response to that request before applying to her for a decision.
7. On 19 April 2017, the Ministers were notified in writing that Mr Rose had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Rose. The Ministers provided the information and the case was allocated to an investigating officer.
8. 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. These questions focused on the searches carried out to identify information covered by the request, and their reasons for applying the exemption in section 30(c). The Ministers responded on 14 June 2017.
9. Mr Rose was invited to explain why, in his view, the withheld information (a single sentence in one document) should be disclosed, and did so.

Commissioner’s analysis and findings

10. 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 Rose and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 1(1) – Information falling within scope of the request

11. Section 1(1) of FOISA creates a general entitlement to be given information held by a Scottish public authority which is requested by an applicant, subject to the application of any exemptions in Part 2 of FOISA and any other relevant provision in Part 1.
12. In discussion with Mr Rose, he questioned whether all of the information falling within scope of his request had been identified.
13. Consequently, the Ministers were asked for submissions on the searches they had undertaken.
14. The Ministers explained that keyword searches had been carried out using their electronic Record and Document Management system (eRDMS). The searches had encompassed the international relations and trade and investment files for the two year period covered by the request (24 November 2014 – 24 November 2016).
15. The Ministers submitted that, given the time period covered by the request, they were satisfied that all relevant information would have been stored in the official files. However, officials in the relevant teams were also asked to conduct searches of any personal filing and individual email accounts and to check for any hard copy records they may have had. They confirmed that no further information was identified.

16. Having considered the Ministers' submissions, the Commissioner accepts that the Ministers carried out adequate searches, with a view to identifying and locating the information requested by Mr Rose.

Section 30(c) of FOISA – prejudice to the effective conduct of public affairs

17. The Ministers withheld a single sentence in a bullet point list under section 30(c) of FOISA.
18. 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 use of the word “otherwise” distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing 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.
19. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner considers the harm in question must be of real and demonstrable significance. The authority must be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some point in the near (certainly foreseeable) future, not simply that the harm is a remote possibility. Each request should be considered on a case-by-case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

Mr Rose's submissions

20. Mr Rose questioned whether the exemption still applied, and whether disclosure would cause harm at the level of “substantial prejudice”, given that the Ministers were no longer pursuing investment from the Qatari government.
21. Mr Rose also questioned whether the Ministers could refuse to disclose information relating to Qatari talks when they had previously disclosed information following talks with Chinese companies about a deal worth up to £10 billion.

The Ministers' submissions

22. The Ministers did not accept that the decision to disclose information relating to investment from China was relevant, in relation to the decision to withhold information covered by Mr Rose's request. The Ministers explained that “the China announcement” was far advanced, having involved numerous discussions and a Memorandum of Understanding had already been signed. All disclosure of information about possible investments had been with the agreement of the organisations involved.
23. In the case under consideration, only initial exploratory discussions had taken place with Qatar, in a private space, to consider possible future opportunities. Even though there had been no further follow-up to these particular conversations, these opportunities could be discussed again in the future, either with Qatari organisations or other States. Therefore, the Ministers considered that the information withheld from Mr Rose remained relevant and should be withheld.

24. The Ministers stated that disclosing information which contains references to possible deals between international partners (whether or not they then came to fruition) could jeopardise future relations and is likely to prejudice substantially the Ministers' ability to engage in and establish potential trade discussions and links. (The Ministers confirmed that the meeting for which the withheld information had been prepared had not taken place.)
25. The Ministers submitted that it was important that the Scottish Government could maintain relationships and not undermine them by disclosing information "that has not progressed beyond an informal discussion of potential for future investment". They considered that disclosure of the withheld information would risk revealing potentially sensitive issues such as future intentions of international partners, which could then have an impact on their commercial interests. The Ministers considered that disclosure of such information would substantially prejudice their ability to engage with other countries or states, or to hold similar talks, if potential investment partners considered that information could not be provided in confidence or would be released prematurely before any agreements had been made.
26. The Ministers argued that it was imperative that the Scottish Government is able to maintain the trust and confidence of potential investment partners, in order to protect and promote trade and investment interests. They submitted that Qatar, or any other countries or states considering trade and investment opportunities would be reluctant to share sensitive information: this would have far reaching consequences for the Ministers' ability to maintain and build relationships with other governments and would directly impact on the promotion of important trade and investment opportunities, affecting Scottish interests at home and abroad.

The Commissioner's conclusions

27. The Commissioner notes that the withheld information is a single sentence: on the face of it, disclosure of such a small amount of information appears to be unlikely to have the serious consequences outlined by the Ministers. However, in reaching a decision on whether disclosure would cause harm at the level of substantial prejudice, the information must be considered in its proper context, including the purpose for which it was created, and the wider context of relations and discussions with the Qatari government.
28. The Commissioner notes that the meeting did not take place; consequently the contents of the briefing note were not discussed with Qatar. The Commissioner has considered whether disclosure of information which was not the subject of discussion or agreement would, or would be likely to, impact negatively on the Scottish Government's relations with Qatar and other governments, by giving rise to concerns that information relating to discussions would be prematurely disclosed.
29. The exemption in section 32 of FOISA (International relations) applies to information which would, or would be likely to, prejudice substantially relations between the United Kingdom and any other State: it does not cover information where disclosure would have a similar effect on the Scottish Government's relations with other countries. However, given that the Ministers' submissions focus on the negative effect that disclosure would have on such relationships, it is relevant for the Commissioner to consider some of the factors which are usually taken into account in cases involving section 32 of FOISA when considering the possibility of harm under section 30(c). The Commissioner accepts that:
 - Public authorities need to concentrate on the potential impact that disclosure may have on a particular relationship or interest, rather than looking solely at the nature, content and/or sensitivity of the information.

- Disclosing potentially controversial information about one state may have little or no impact, while disclosing seemingly innocuous information about a different state may have a substantial impact.
 - Cultural, religious or legislative differences may also be relevant. The attitude of a particular State or organisation towards freedom of information may be relevant: relations with States or bodies which are less open may be at greater risk of prejudice if sensitive information is released.
30. The Commissioner accepts that disclosure of the withheld information would reveal one of the topics which the Scottish Government hoped to discuss with Qatar. In reaching a decision on whether the information in this case was correctly withheld under section 30(c) of FOISA, the Commissioner has taken into account the fact that while the information was prepared for a meeting which did not take place, it is possible that discussions with Qatar may take place at some point in the future. She accepts that discussions with Qatar had been at an early stage, in a private space. In these circumstances, she accepts that, at this time, disclosure of information about a potential agenda item would be likely to be viewed as premature by the Qatari government, and detrimental to good relations with Qatar.
31. The Commissioner does not accept all of the arguments put forward by the Ministers in this case. The Ministers have argued that disclosure of the information about the agenda item would deter other governments from providing confidential information. In this case, the information did not come from Qatar, but originated with the Scottish Government.
32. However, the Commissioner accepts that disclosure of the withheld information would be likely to cause substantial prejudice to the effective conduct of public affairs. Discussions about investment from Qatar were clearly at an early stage. Disclosure of the withheld information would make it less likely that Qatar would engage in future discussion on this matter, given the loss of confidentiality and privacy.
33. The exemption in section 30(c) is subject to the public interest test in section 2(1)(b) of FOISA. 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.

Public interest test

34. The public interest is not defined in FOISA, but has been described in previous decisions as "something which is of serious concern and benefit to the public", not merely something of individual interest. It has also been held that the public interest does not mean "of interest to the public" but "in the interests of the public", i.e. disclosure must serve the interests of the public.

The Ministers' submissions

35. The Ministers acknowledged that there is some public interest in the Scottish Government's discussions with other States, such as Qatar. They also accepted that there is a public interest in disclosing information as part of open, transparent and accountable government. The Ministers considered that disclosure of some of the information covered by Mr Rose's request demonstrated that they fully recognise the public interest in this issue.
36. However, the Ministers considered that this was outweighed by a greater public interest in allowing Ministers and officials a private space within which to communicate and explore opportunities with potential international investors. They believed this private space was

essential to enable all options to be properly considered so that good decisions could be taken, based on confidential discussions.

37. Ultimately, the Ministers considered that disclosure would undermine the decision making process of the Scottish Government and that this would not be in the public interest.

Mr Rose's submissions

38. Mr Rose did not comment directly on why disclosure of the withheld information would be in the public interest. He asked the Commissioner whether the public interest arguments put forward by the Ministers "still work if talks with the Qatari governments and agencies have ended, as they appear to have done?" He also referred to the information which the Scottish Government had disclosed about an investment following talks with Chinese companies.

The Commissioner's conclusions

39. The Commissioner accepts there is a general public interest in ensuring transparency and accountability, particularly when the Scottish Government is engaged in discussions or entering into agreements with other countries. When the Scottish Government meets with representatives of other governments, it is essentially representing the people of Scotland, and as such there is an expectation of openness and transparency, particularly where meetings concern discussions about investments which could have an impact on the people of Scotland.
40. The Commissioner accepts that it is in the public interest for journalists, such as Mr Rose, to be able to report on the activities of the Scottish Government, so that the Scottish people are informed.
41. However, the public interest in the disclosure of the information (information prepared for a meeting which never took place) must be balanced against the public interest in withholding the information. The Commissioner has accepted that disclosure would, or would be likely to, cause substantial prejudice to the effective conduct of public affairs, because the information relates to a topic which may be the subject of future discussions with Qatar, and premature disclosure may have an adverse effect on such discussions. That would not be in the public interest. Although there is a public interest in the disclosure of the information, the Commissioner does not consider it strong enough to outweigh the public interest in maintaining the exemption. On balance, therefore, the Commissioner is of the view that the public interest in withholding the information outweighs the public interest in disclosing it.
42. The Commissioner therefore finds that the Ministers were entitled to withhold the information under section 30(c) of FOISA.

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 Rose.

Appeal

Should either Mr Rose or the 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
Acting Scottish Information Commissioner

9 August 2017

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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