

FOISA Guidance

Section 29: Formulation of Scottish Administration policy etc.

Exemption Briefing



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Glossary and abbreviations

Term used	Explanation
The Commissioner	The Scottish Information Commissioner
SIC	The Scottish Information Commissioner, staff of SIC (depends on context)
FOISA	Freedom of Information (Scotland) Act 2002
Government Policy	Any policy of the Scottish Administration. Includes UK Government policy if created before 1 July 1999 (section 29(4) of FOISA)
Law Officers	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 (section 29(4) of FOISA)
Minister	A member of the Scottish Government or a junior Scottish Minister
Ministerial communications	Any communications between Ministers. Includes communications relation to proceedings of the Scottish Cabinet (or of any committee of that Cabinet) (section 29(4) of FOISA)
Ministerial private office	Any part of the Scottish Administration which provides personal administrative support to a Minister.
Scottish Administration	The office-holders in the Scottish Administration and the members of the staff of the Scottish Administration (section 126(6) of the Scotland Act 1998)

The exemption

The exemption: the main points

1. Section 29 of the Freedom of Information (Scotland) Act 2002 (FOISA) exempts information from disclosure if it relates to:
 - (i) the formulation or development of government policy
 - (ii) Ministerial communications
 - (iii) the provision of advice by any of the Law Officers (or any request for the provision of such advice) or
 - (iv) the operation of any Ministerial private office.
2. The section 29 exemptions are sometimes referred to as “class-based” exemptions. This means that the exemption will apply if the information falls within a particular class of information (e.g. Ministerial communications). Unlike most of the exemptions, the authority does not have to demonstrate that disclosure of the information would cause harm before applying the exemption.
3. The exemptions in section 29 are all subject to the public interest test. This means that, even if the exemption applies, the information must be disclosed unless the public interest in withholding the information outweighs the public interest in disclosing it. When applying the public interest test, the Scottish Administration must consider the public interest in disclosing the factual information used to inform a decision.
4. The exemptions in section 29 do not last forever. In general, they cannot be applied to information that is more than 15 years old.
5. With the exemptions in section 29, a public authority can refuse to confirm or deny whether it holds the information, provided the authority is satisfied that revealing whether the information exists or is held would be contrary to the public interest (section 18 of FOISA).
6. Where the First Minister disagrees with a decision from the Commissioner concerning section 29(1), the First Minister can overrule the Commissioner’s decision, provided the information is of exceptional sensitivity and provided the First Minister has consulted the other members of the Scottish Government (section 52 of FOISA). At the date of publication of this guidance, no certificates have ever been issued.

Section 29(1)(a) – formulation or development of government policy

Applying the exemption

7. Information is exempt under section 29(1)(a) if it relates to the formulation or development of government policy. There is no harm test in the exemption: information will be exempt simply because it relates to the formulation or development of government policy. The information will need to be considered on a case by case basis. The Commissioner has rejected the argument that all information with any association with policy documents is automatically covered by section 29(1)(a). See **Appendix 1: Resources** for examples of decisions by the Commissioner.
8. The Commissioner has interpreted “formulation or development of policy” as the consideration or development of options and priorities for Scottish Ministers, who will

subsequently determine which of these should be translated into political action and/or legislation and when.

9. The formulation of government policy suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to Scottish Ministers.
10. “Development” suggests the processes involved in reviewing, improving or amending already existing policy. It could involve piloting, monitoring, analysing, reviewing or recording the effects of existing policy.
11. Section 29(2) states that, once a policy decision has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded as relating to the formulation or development of the policy in question. In other words, it will no longer be exempt under section 29(1)(a).

The public interest test

12. If the exemption applies, the authority must go on to consider the public interest in relation to the information – see section 2(1)(b) of FOISA. This means assessing whether, in all the circumstances of the case, the public interest is better served by disclosing or withholding the information. The authority must identify and set out the competing arguments as to why the public interest would be served not only by disclosing the information, but also by withholding it. Having identified the public interest arguments on each side, the authority must then carry out an exercise to determine where, on balance, the public interest lies. There is an in-built presumption in FOISA that it is in the public interest to disclose information unless a public authority can show why there is a greater public interest in withholding the information.
13. FOISA does not define the term “public interest”, but it has been described as “something which is of serious concern and benefit to the public.” It has also been said that the public interest does not mean what is of interest **to** the public, but what is in the interest **of** the public.
14. Section 29(3) states that, in applying the public interest test to information which is exempt under section 29(1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
15. There is no harm test attached to the exemption, but when looking at the public interest test, the possibility of harm may be a relevant consideration.
16. The Commissioner has published guidance on the public interest test (see **Appendix 1: Resources**).

Section 29(1)(b) – Ministerial communications

Applying the exemption

17. Information is exempt under section 29(1)(b) if it relates to communications between Ministers. This includes communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet).
18. The exemption covers information “relating to” Ministerial communications, so it covers more than just direct communications between Ministers. It could also cover things like:
 - (i) records of discussions between Ministers

- (ii) drafts of letters, whether or not the letters were finalised or sent
19. The communication must be between two or more Ministers; the exemption won't apply to communications between a Minister and officials or other third parties. However, communications between private secretaries, when corresponding on their respective Minister's behalf, will be covered by the exemption.
20. Section 29(2) states that, once a policy decision has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded as relating to Ministerial communications. In other words, it will no longer be exempt under section 29(1)(b).

The public interest test

21. As with the other exemptions in section 29, the exemption in section 29(1)(b) is subject to the public interest test (see above).
22. See **Appendix 1: Resources** for examples of decisions by the Commissioner.

Section 29(1)(c) – Law Officers' advice

Applying the exemption

23. Information is exempt under section 29(1)(c) if it relates to the provision of advice by any of the Law Officers or any request for the provision of advice by any of the Law Officers.
24. The exemption is similar to the exemption in section 36(1) of FOISA (Confidentiality), as both protect communications between client and lawyer. However, section 29(1)(c) is wider in its scope and may include information, such as advice on matters other than the application of the law, to which lawyer/client confidentiality would not apply. (For guidance on section 36, see **Appendix 1: Resources**.)
25. Part 2 of the Scottish Ministerial Code (see **Appendix 1: Resources**) gives examples of the types of situations where Law Officers' advice should be sought. This includes where:
- (i) the legal consequences of action by the Government might have important repercussions
 - (ii) where a legal adviser in the Government has doubts about the legality or constitutional propriety of proposed legislation or executive action
 - (iii) Ministers, or their officials, wish to have the advice of Law Officers on questions involving legal considerations or
 - (iv) where there is a particular legal difficulty that may raise sensitive policy issues.

The public interest test

26. As with the other exemptions in section 29, the exemption in section 29(1)(c) is subject to the public interest test (see above).
27. The Scottish Ministerial Code (see **Appendix 1: Resources**) states that the fact that legal advice has or has not been given by the Law Officers must not be revealed outwith the Scottish Government without the Law Officers' prior consent. (As with earlier versions of the Code, this rule does not apply in relation to Bills introduced in the Parliament because it is acknowledged publically that Law Officers advise on the legislative competence of Government Bills.) The Code, as amended in February 2018, states (at paragraph 2.40):

If, in exceptional circumstances, Ministers feel that the balance of public interest lies in disclosing either the source or the contents of legal advice on a particular matter, the Law Officers must be consulted and their prior consent obtained. Such consent will only be granted where there are compelling reasons for disclosure in the particular circumstances.

28. Although the Code states that Law Officers' advice should not be revealed except in exceptional circumstances, and not without the consent of the Law Officers, the rules in the Code do not have precedence over FOISA. Accordingly, the Code does not make section 29(1)(c) an absolute exemption – the public interest test must still be applied in determining whether information can be withheld, and this may result in a requirement for disclosure, even where the Law Officers do not consent. See **Appendix 1: Resources** for examples of decisions by the Commissioner.

Section 29(1)(d) – Ministerial private office

Applying the exemption

29. Information is exempt under section 29(1)(d) if it relates to the operation of any Ministerial private office.
30. The Commissioner has only considered one case which looked at how this exemption works in practice. See **Appendix 1: Resources**.

The public interest test

31. As with the other exemptions in section 29, the exemption in section 29(1)(d) is subject to the public interest test (see above).

Appendices

Appendix 1: Resources

SIC Decisions

Reference	Decision number	Parties	Summary
Section 29(1)(a) Paragraph 7	130/2006	Paul Hutcheon and the Scottish Ministers	“Relate to” means more than simply having some association with an area of activity devolved to the Scottish Ministers.
Section 29(1)(a) Paragraph 7	057/2005	William Alexander and the Scottish Ministers	In applying the public interest test, it may be necessary to distinguish different stages in policy development. In this case, a distinct and active phase of policy development started in February 2003. We were satisfied that, on balance, it was in the public interest to disclose information before February 2003, but not after it.
Section 29(1)(a) Paragraph 7	166/2006	Martin Williams and the Scottish Ministers	Having read the information, we were satisfied that papers on a summit on sectarianism given by the government related to the formulation or development of policy, rather than the implementation of policy.
Section 29(1)(a) Paragraph 7	010/2009	Paul Martin MSP and the Scottish Ministers	We accepted that information about the policy of recruiting 1,000 additional police officers related to the formulation or development of the policy. However, we ordered the Ministers to disclose some of the information on public interest grounds – disclosure would provide insight into the key steps taken to develop the policy.
Section 29(1)(b) Paragraph 22	143/2007	Barry Winetrobe and the Scottish Ministers	The exemption did not apply to a note from a Minister’s private secretary to an official.
Section	178/2013	Tom Gordon and the	Mr Gordon wanted copies of the Government’s submissions to the Law

29(1)(c) Paragraph 28		Scottish Ministers	Officers on an independent Scotland's position within the EU. The decision looks at the public interest arguments both in favour of and against disclosing the information. Following an investigation, we found that the public interest lay in maintaining the exemption.
Section 29(1)(c) Paragraph 28	105/2007	Paul Hutcheon and the Scottish Ministers	Here, we accepted that discussions about the need to seek Law Officers' advice were covered by section 29(1)(c) as they "related to" the provision of advice.
Section 29(1)(d) Paragraph 30	105/2007	Paul Hutcheon and the Scottish Ministers	We were satisfied that, given the use of the word "any" in the exemption, the exemption would apply to information on the operation of Ministerial private offices in general.

All of the Commissioner's decisions are available on the Commissioner's website. To view a decision, go to www.itspublicknowledge.info/decisions and enter the relevant decision number (e.g. 032/2014).

If you don't have access to the internet, contact our office to request a copy of any of the Commissioner's briefings or decisions. Our contact details are on the final page.

Other resources

Paragraph	Resource	Link
Glossary	Scotland Act 1998	http://www.legislation.gov.uk/ukpga/1998/46/contents
Paragraph 16	Commissioner's guidance: The Public Interest Test – FOISA	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/ThePublicInterestTest/thePublicInterestTestFOISA.aspx
Paragraph 25	Scottish Ministerial Code 2018	http://www.gov.scot/Publications/2018/02/4516/downloads#res531094
Paragraph 24	Section 36 (Confidentiality) guidance	http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section36/Section36.aspx

Appendix 2: The exemption

Section 29 *Formulation of Scottish Administration policy etc.*

- (1) Information held by the Scottish Administration is exempt information if it relates to-
 - (a) the formulation or development of government policy;
 - (b) Ministerial communications;
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; or
 - (d) the operation of any Ministerial private office.
- (2) Once a decision as to policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded, for the purposes of –
 - (a) paragraph (a) of subsection (1), as relating to the formulation or development of the policy in question; or
 - (b) paragraph (b) of that subsection, as relating to Ministerial communications.
- (3) In determining any question under section 2(1)(b) as respects information which is exempt information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
- (4) In this section-

"government policy" means-

 - (a) the policy of the Scottish Administration; and
 - (b) in relation to information created before 1st July 1999, the policy of the Government of the United Kingdom;

"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;

"Ministerial communications" means any communications between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or of any committee of that Cabinet); and

"Ministerial private office" means any part of the Scottish Administration which provides personal administrative support to a Minister.
- (5) In the definitions of "Ministerial communications" and "Ministerial private office" in subsection (4), "Minister" means a member of the Scottish Executive or a junior Scottish Minister.

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