

Freedom of Information (Scotland) Act 2002 Briefings Series

Section 29 Formulation of Scottish Administration Policy etc.

1. Scope of briefing

The Freedom of Information (Scotland) Act 2002 introduces a right of access to information held by Scottish public authorities. The Act comes into force in January 2005. The Scottish Information Commissioner has produced this briefing as part of a series of briefings designed to aid understanding of the Act and prepare the public and public authorities for its implementation. It aims to provide an overview of how the Commissioner views section 29 of the Act.

The briefing will be developed over time as the Commissioner determines applications under the Act and the courts make decisions. It is not a comprehensive statement of the exemption and does not constitute legal advice.

The briefing is referenced throughout and, where appropriate, it will recommend additional sources for further reading.

2. What does the Act say?

Section 29 is a qualified exemption and is subject to the public interest test. It exempts information held by the Scottish Administration from disclosure if the information relates to:

- The formulation or development of government policy;
- Ministerial communications;
- Provision of advice by the Law Officers or any request for the provision of such advice; or
- The operation of any Ministerial Private Office.¹

[Link to the Appendix for the full text of the exemption.](#)

This exemption applies not only to information relating to the post-devolution Scottish Administration but also to information created by the UK Government before devolution.² The Scottish Administration holds a large amount of information about UK Government policy which it inherited at devolution. Most of this information concerns policy in devolved areas which are now the responsibility of the Scottish Ministers. During the passage of the Freedom of Information Bill through the Scottish Parliament it was felt that it would be appropriate to apply the same exemption to pre-devolution as to post-devolution information.³

Purpose of section 29

This exemption is designed to ensure that Scottish Administration policy can be formulated and developed effectively. The exemption aims to allow the Scottish Administration to

¹ Freedom of Information (Scotland) Act 2002, s 29(1); *hereafter* "FOI(S)A 2002"

² FOI(S)A 2002, s 29 (4)(b)

³ Freedom of Information (Scotland) Act 2002 (asp) (Annotated), Current Law Statutes published by W Green, 13-52 ; *hereafter* FOI(S)A 2002 (Annotated)

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discuss and formulate policy with candour and frankness without having to take into account the possibility of publication of relevant information.⁴

3. Definition of key terms:

The Scottish Administration

There is no definition of the term “Scottish Administration” in section 29. However, the Scotland Act 1998⁵ defines “Scottish Administration” as:

- Members of the Scottish Executive and junior Scottish Ministers and their staff;
- Non-ministerial office holders of the Scottish Administration and their staff.

The non-ministerial office holders who are subject to the Freedom of Information (Scotland) Act 2002 are listed in Schedule 1, Part 2 of the Act.

The Scottish Ministers

The First Minister, Ministers appointed by the First Minister, the Lord Advocate and the Solicitor General for Scotland are members of the Scottish Executive. Members of the Scottish Executive are referred to collectively as the Scottish Ministers.

Government Policy

Government policy refers to any policy of the Scottish Administration, and if it relates to information created before 1 July 1999, to the policy of the Government of United Kingdom.⁶

Law Officers

This is a reference to 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.

Provision of advice by the Law Officers

Information is exempt if it relates to the provision of advice by the Law Officers to the Scottish Administration or any requests for provision of such advice.⁷

This particular category of information is also likely to fall under the “confidentiality of communications” exemption in section 36 (1) of the Act.

This provision is also emphasized by the Scottish Ministerial Code.⁸ The Scottish Ministerial Code requires that the Law Officers are consulted in good time before the Executive is committed to critical decisions involving legal considerations.⁹ The Code also

⁴ Scottish Parliament, Justice 1 Committee Official Reports, Meeting No 6, 2002, 26 February 2002

⁵ Scotland Act 1998, s 126 (6) and (7)

⁶ FOI(S)A 2002, s 29 (4)

⁷ FOI(S)A 2002, s 29 (1)(c)

⁸ Scottish Ministerial Code, Scottish Executive August 2003, paras 2.22-2.23

⁹ Scottish Ministerial Code, para 2.22

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stipulates that the facts and contents of opinions or advice given by the Law Officers, either individually or collectively, must not be disclosed publicly without their authority.¹⁰

Ministerial communication

This refers to any communication between Ministers and includes, in particular, communications relating to proceedings of the Scottish Cabinet (or any committee of that Cabinet).¹¹

Ministerial private office

This comprises any part of the Scottish Administration which provides personal administrative support to a Minister.¹²

4. Type of exemption

Section 29 is a qualified exemption and is therefore subject to the public interest test. Even when public authorities find that this exemption applies to the information requested, they must go on to consider whether, in all the circumstances of the case, the public interest in withholding the information is outweighed by the public interest in disclosing the information. If the two are evenly balanced, the presumption should always be in favour of disclosure.

Section 29 is also a class-based exemption. The phrase “class exemption” is not used in the Act but was adopted in the discussions during the consultation process. The presumption is that this section exempts all the information that falls within this class from disclosure.

5. Consideration of the public interest test

When considering requests for information which is likely to be exempt under section 29, the Scottish Administration must consider the public interest test. The test should be applied to all the factual information which has been used, or is intended to be used, to provide an informed background to the taking of a policy decision.¹³

One difficulty facing public authorities is that the Act does not define the public interest. This ambiguity is intentional. Legislators and policy makers recognise that the public interest will change over time and according to the circumstances of each situation.

Public interest has been described as “something which is of serious concern and benefit to the public”. It has also been held that public interest does not mean what is *of interest* to the public but what is *in the interest of* the public. As what constitutes the public interest may change over time and according to the circumstances of each case, authorities will need to make any judgements on a case by case basis in the light of emerging guidance or best practice.

¹⁰ Scottish Ministerial Code, para 2.23

¹¹ FOI(S)A 2002, s 29 (4)

¹² FOI(S)A 2002, s 29 (4)

¹³ FOI(S)A 2002, s 29 (3)

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The Scottish Administration, when seeking to rely on this exemption, must ensure that they apply the public interest test rigorously to each request for information and, importantly, maintain an audit trail of this process. In the event of an appeal to the Scottish Information Commissioner, the Scottish Administration must be able to show how it has applied the test to specific information requests.

Openness is at the heart of the freedom of information regime and there is a presumption that enhanced openness is in the public interest. When applying the public interest test, the Scottish Administration should give serious consideration to the following factors:

- Disclosure would enhance scrutiny of decision making processes and thereby improve accountability;
- Disclosure would promote informed public participation in the processes of the government;
- Disclosure would contribute to a debate on a matter of public interest.

In deciding whether disclosure is in public interest, the Scottish Administration should not take into account:

- Possible embarrassment to the government or to other public authority officials;
- The seniority of persons involved in the subject matter;
- Possible loss of confidence in government or other public body;
- The risk of the applicant misinterpreting the information.

6. Additional Issues of Relevance

Ministerial Certificate

This exemption is subject to section 52 of the Act. If the First Minister disagrees with a decision of the Scottish Information Commissioner that this exemption on the formulation of policy has been used wrongly by the Scottish Administration, then the First Minister can overrule the Commissioner's decision by issuing a certificate, stating that the Scottish Administration did use the exemption correctly. The First Minister can only issue such a certificate if the information requested is of exceptional sensitivity and can only do so after consulting the other members of the Executive. A copy of the certificate must also be laid before Parliament.

A certificate can only be issued in response to a decision notice or enforcement notice from the Scottish Information Commissioner in relation to a specific request for information. This certificate does not prevent the Scottish Information Commissioner from issuing another decision or enforcement notice in response to another request for the same information. This will require the First Minister to issue a new certificate and not rely on the certificate he has already issued.

Falling away of the exemption with time

Information exempt under section 29 ceases to be exempt after 30 years when it becomes a "historical record". For the purposes of the Act, a record becomes a "historical record" at

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the end of the period of 30 years which commences at the beginning of the calendar year following the year in which the record was created.¹⁴

Refusal of requests, without admitting that information exists or is held

Where the Scottish Administration takes the view that this exemption on the formulation of policy applies to a request for information, it can (by virtue of section 18 of the Act) give a refusal notice to the applicant without having to reveal whether the information exists or is so held by the Administration. This provision is based on the presumption that for the authority to confirm whether the information exists or is held would be contrary to the public interest.

7. Implementation issues

Once the Scottish Administration has made a policy decision, any statistical information “used to provide an informed background” to the decision making is no longer exempt and can be disclosed.¹⁵ This is likely to mean that any statistical information canvassed should be made available, not just the statistical information which supports the policy decision.¹⁶

When the Freedom of Information Bill was being considered at the Justice 1 Committee meeting of 26 February 2002, the Justice Minister stated it is important that internal opinion, advice, recommendations and deliberations should be confidential, to ensure that such matters are candidly and frankly discussed in Government and to ensure that a full record of the discussions can be kept without at every turn taking account of the possibility of publication. As an example, he took the view that it was appropriate for the results of the two - year investigation into concerns about cancer among workers at the Greenock plant of National Semiconductor (UK) Limited to be published only after the workers and the general practitioners had been briefed and after arrangements for provision of counselling to the workers had been put in place.¹⁷

However, this exemption is subject to the public interest test and the Scottish Administration will need to consider each request for information in the light of what is in the public interest.

Factual Information

One practical difficulty may be in drawing clear lines between and among statistics, facts, analysis and opinion.¹⁸ In this respect, the experience of the UK Parliamentary Ombudsman and the Irish Commissioner may assist the consideration of this particular part of the exemption.

It is important to note that the following do not necessarily represent the views of the Scottish Information Commissioner. The Commissioner will form his views over time as he determines applications under the Act and the courts make decisions.

¹⁴ FOI(S)A 2002, s 57-58

¹⁵ FOI(S)A 2002, s 29 (2)

¹⁶ Freedom of Information (Scotland) Act 2002 (Annotated), 13-51; *hereafter* “Annotated Act”

¹⁷ Annotated Act, 13-50

¹⁸ Annotated Act 13-51; Hansard H. L. October 24, 2000, Col. 297

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The Irish Commissioner has found it necessary to examine the contents of each record to define factual information. For example, he examined a set of minutes and found that the reporting of opinions, advice or recommendations at the meeting were not factual information but that the attendance lists for these meetings were.¹⁹

In another case where the Irish Commissioner examined the contents of the records in question, he decided that reports of actual expenditure, amount of budget variance, steps taken to keep within budget, and changes that have caused the increased expenditure of health boards were all factual information and could be disclosed. The parts of the records which reflected proposed courses of action being considered by the agencies of the Health Department were not factual information.²⁰

The UK Parliamentary Ombudsman has also adopted a similar interpretation of what constitutes factual information. She finds that advice, opinion and internal discussion are not factual information and are thus protected from disclosure by exemption 2 of the Code of Practice on Access to Government Information.²¹

In a case involving the Cabinet Office in 2003, the Parliamentary Ombudsman found that a background briefing for Parliamentary Questions contained factual information and advice, opinions and recommendations. She accepted that the official's views and advice or a discussion of policy could be withheld and welcomed the Cabinet Office's decision to release the factual information in an edited version of the background briefing.²²

The Queensland Freedom of Information Act 1992 contains a similar exemption but differs significantly from the Freedom of Information (Scotland) Act 2002 in that it clearly identifies the categories of information which are exempt and the categories which are not. The Queensland Act exempts the following information from disclosure:

- any opinion, advice, or recommendation that has been obtained, prepared, or recorded; or
- any consultation or deliberation that has been carried out by the government as part of its deliberative processes

where disclosure would, on balance, be contrary to the public interest.

According to the same section, factual or statistical information, expert opinion or analysis, record of a final decision, order or ruling given in the exercise of a power, an adjudicative function, a statutory function, or the administration of a publicly funded scheme are not

¹⁹ Case 98127, 1999

²⁰ Case 98078, 1999

²¹ The Parliamentary Ombudsman, Investigations Completed July 2003 – June 2004, Case No: A. 24/03

²² The Parliamentary Ombudsman, Investigations Completed July 2003 – June 2004, Case No: A.25/03

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exempt.²³ (The above is only an incomplete excerpt and readers should consult the Queensland Act for the full text of this exemption.)

8. Overseas experience

This exemption is common to all the freedom of information regimes, including those regimes in Canada, Ireland and Australia.

In Canada, section 21 of the Access to Information Act specifies categories of information relating to the operations of the government which cannot be disclosed. Further information is available at the following website:

http://www.infocom.gc.ca/acts/view_article-e.asp?intArticleId=34#21,1

In Ireland, section 19 of the Freedom of Information Act 1997 and the Freedom of Information (Amendment) Act 2003 restricts disclosure of Government records. Further information relating to the scope of this exemption and the index of decisions made by the Irish Commissioner can be found on the following website:

<http://www.oic.gov.ie/>

A similar provision in the Queensland Freedom of Information Act 1992 has been introduced in section 6 of this briefing in some detail. Further information is available at the following website:

<http://www.infocomm.qld.gov.au/>

9. Updates

The guidance in this briefing may be amended following any decisions by the Scottish Information Commissioner on appeals involving this exemption, should his decisions provide further guidance on the interpretation of this section of the Freedom of Information (Scotland) Act 2002. Updates to this briefing and the others in this series will be publicised in the Commissioner's website and monthly newsletter.

October 2004

²³ Queensland Freedom of Information Act 1992, s 41

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Sources

1. Freedom of Information (Scotland) Act 2002
2. Freedom of Information (Scotland) Act 2002 (Annotated), Current Law Statutes published by W. Green
3. Scottish Parliament, Justice 1 Committee Official Reports
4. Scottish Ministerial Code, Scottish Executive August 2003
5. Hansard H.L.
6. The Parliamentary Ombudsman, Investigations Completed July 2003-June 2004
7. Freedom of Information Act 1997, Ireland
8. Freedom of Information (Amendment) Act 2003, Ireland
9. Queensland Freedom of Information Act 1992
10. Access to Information Act, Canada
11. J MacDonald and C H Jones, *The Law of Freedom of Information*, OUP 2003

Further reading

1. Balancing the Public Interest: Applying the public interest test to exemptions in the UK Freedom of Information Act 2000 by Meredith Cook, August 2003, published by the UK Constitution Unit and available at – www.ucl.ac.uk/constitution-unit/publications/index.php

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Appendix: Section 29

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.