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J Stewart

By email: request-520090-f7656e73@whatdotheyknow.com

Our ref: Fol/18/02545
15 October 2018

Dear J Stewart

**REQUEST UNDER THE FREEDOM OF INFORMATION (SCOTLAND) ACT 2002 (FOISA):
REVIEW OF GENDER RECOGNITION ACT CONSULTATION**

Introduction

1. Thank you for your request dated 16 September 2018 under the Freedom of Information (Scotland) Act 2002 (FOISA).

Your request

2. You asked:

1/ What groups/organisations/stakeholders were consulted around the development of the consultation paper?

2/ Please provide copies of all the data which includes or makes reference to those consulted groups in relation to the development of the consultation paper.

The data should include copies of all emails, reports, evidence, assessments, letters, notes from meetings, notes from telephone calls etc That data should include copies of all communications from those 'consulted groups' to the Scottish Government AND copies of all communications from the Scottish Government to the 'consulted groups' AND copies of all communications to and from internal Scottish Government departments.

3/ What groups/organisations/stakeholders were permitted to see any draft versions of the consultation paper prior to its publication?

4/ What groups/organisations/stakeholders suggested amendments to any draft versions of the consultation paper prior to its publication?

5/ What were those amendments?

6/ Who was responsible for citing the example case law of the ECHR ruling AP, Garcon & Nicot V France (2017) within the consultation paper?

7/ Who authorised the final version of the consultation paper?

Response to your request: general

3. I enclose some of the information you requested.

4. As outlined in more detail below, some of the information you have requested is available from the consultation document itself (at <https://beta.gov.scot/publications/review-gender-recognition-act-2004/>) or from the Scottish Government website: <https://www.gov.scot/>. Under section 25(1) of FOISA, we do not have to give you information which is already reasonably accessible to you. If, however, you do not have internet access to obtain this information from the websites listed, then please contact me again and I will send you a paper copy.

5. While our aim is to provide information whenever possible, in this instance we are unable to provide some of the information you have requested because an exemptions under sections s.29(1)(a) (policy formulation), and s.38(1)(b) (third party personal information) of FOISA applies to that information. The reasons why that exemption(s) applies are explained in the Annex to this letter.

Response to your request: answers on the specific questions you raise

6. This part of the reply to your request deals with specific points you have raised.

1/ What groups/organisations/stakeholders were consulted around the development of the consultation paper?

7. Information on this was provided at the response to point 3 in FOI release FOI/2017/02964: <https://beta.gov.scot/publications/foi-17-02964/>

2/ Please provide copies of all the data which includes or makes reference to those consulted groups in relation to the development of the consultation paper. The data should include copies of all emails, reports, evidence, assessments, letters, notes from meetings, notes from telephone calls etc That data should include copies of all communications from those 'consulted groups' to the Scottish Government AND copies of all communications from the Scottish Government to the 'consulted groups' AND copies of all communications to and from internal Scottish Government departments.

The attachment to this letter contains some of the information requested. To the extent that some information we hold includes and refers to an extract of the Women and Equalities Select Committee Report on Transgender Equality, you can see this at <https://www.parliament.uk/business/committees/committees-a-z/commons-select/women-and-equalities-committee/inquiries/parliament-2015/transgender-equality/>.

3/ What groups/organisations/stakeholders were permitted to see any draft versions of the consultation paper prior to its publication?

4/ What groups/organisations/stakeholders suggested amendments to any draft versions of the consultation paper prior to its publication?

5/ *What were those amendments?*

8. This information is contained in the attachment. On 6 Nov 2017, we disclosed the draft consultation to the Equality Network/ Scottish Trans Alliance. They suggested three changes to the draft consultation as set out in their email response of 6 November 2017.

6/ *Who was responsible for citing the example case law of the ECHR ruling AP, Garçon & Nicot V France (2017) within the consultation paper?*

9. The Scottish Government.

10. As paragraphs 3.11 and 3.12 of the consultation paper indicates, the Scottish Government identified the systems of legal gender recognition currently being used in 16 other countries or territories. In broad terms, there appeared to be three models in use: the “treatment model”; the “assessment model” and the “self-declaration model”.

11. While carrying out this research, the Scottish Government noted the decision by the European Court of Human Rights in AP, Garçon and Nicot v France [2017] ECHR 338. The decision is available on line at <http://hudoc.echr.coe.int/eng?i=001-172913>

7/ *Who authorised the final version of the consultation paper?*

11. The Scottish Ministers.

12. Information on this was provided at the response to point 2 in FOI release FOI/2017/02964: <https://beta.gov.scot/publications/foi-17-02964/>.

Your right to request a review

If you are unhappy with this response to your FOI request, you may ask us to carry out an internal review of the response, by writing to Neil Rennick, Director of Justice, Room GW-02, St Andrew’s House, Regent Road, Edinburgh, EH1 3DG Email: DirectorofJustice@gov.scot. Your review request should explain why you are dissatisfied with this response, and should be made within 40 working days from the date when you received this letter. We will complete the review and tell you the result within 20 working days from the date when we receive your review request.

If you are not satisfied with the result of the review, you then have the right to appeal to the Scottish Information Commissioner. More detailed information on your appeal rights is available on the Commissioner’s website at:

<http://www.itspublicknowledge.info/YourRights/Unhappywiththeresponse/AppealingtoCommissioner.aspx>.

Yours sincerely



SARAH E DUNCAN
Family Law

An exemption applies

An exemption(s) under section 38(1)(b) of FOISA applies to some of the information you have requested. This exemption applies because it is personal data relating to an identified or identifiable natural person, such as the names (or other identifying information) of officials and other natural persons. Disclosing it would contravene the data protection principles in Article 5(1) of the General Data Protection Regulation and in section 34(1) of the Data Protection Act 2018.

This exemption is not subject to the 'public interest test', so we are not required to consider if the public interest in disclosing the information outweighs the public interest in applying the exemption.

An exemption applies, subject to the public interest test

An exemption under section 29(1)(a) (formulation or development of government policy) of FOISA applies to some of the information you have requested because it relates to the formulation and development of the Scottish Government's policy on reform of the Gender Recognition Act 2004.

This exemption is subject to the 'public interest test'. 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 the reform of the 2004 Act 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.