

Item 1:**From:** [Redacted – S.38(i)(b)] On Behalf Of Permanent Secretary**Sent:** 18 December 2020 19:08**To:** Evans L (Leslie) [Redacted – S.38(i)(b)]**Cc:** Permanent Secretary <PermanentSecretary@gov.scot>; [Redacted – S.38(i)(b)]**Subject:** Daily Note 18.12.2020**[Redacted – Out of Scope]**

Keatings v Advocate General – INFO [Redacted – S.38(i)(b)] Note went to Ministers for information only as the Scottish Ministers have withdrawn from the case. Keatings will ask the court to declare that the Scottish Parliament has the competence to legislate for an independence referendum. The Court of Session will hear the case on 21 & 22 Jan 2021. The Advocate General will argue that this is not a question that can be resolved in the abstract, and will argue that in any event the Scottish Parliament does not have this competence. [Redacted – S.36(1)]

[Redacted – Out of Scope]**Item 2:****From:** [Redacted – S.38(i)(b)]**Sent:** 22 January 2021 15:31**To:** Cabinet Secretary for Constitution, Europe and External Affairs

<CabSecCEAEA@gov.scot>; First Minister <firstminister@gov.scot>; Permanent Secretary <PermanentSecretary@gov.scot>

Cc: Thomson KAL (Ken) (Director-General) [Redacted – S.38(i)(b)]; Rogers D (David) (Constitution and Cabinet Director) [Redacted – S.38(i)(b)]; Curtis PS (Penelope)

[Redacted – S.38(i)(b)]; Hynd JS (James) [Redacted – S.38(i)(b)]; Crawford E (Ewan)

[Redacted – S.38(i)(b)]; Lloyd E (Elizabeth) [Redacted – S.38(i)(b)]; Nicolson S (Stuart)

Special Adviser [Redacted – S.38(i)(b)] Ferguson SE (Shirley) [Redacted – S.38(i)(b)];

Subject: RE: Keatings v Adv Gen for Scotland -- note on hearing (OFF/SEN)

Copying in Perm Sec

[Redacted – S.38(i)(b)]**From:** [Redacted – S.38(i)(b)]**Sent:** 22 January 2021 15:04**To:** Cabinet Secretary for Constitution, Europe and External Affairs ; First Minister**Cc:** Thomson KAL (Ken) (Director-General) ; Rogers D (David) (Constitution and Cabinet Director) ; [Redacted – S.38(i)(b)] ; Curtis PS (Penelope) ; Hynd JS (James) ; [Redacted – S.38(i)(b)]; Crawford E (Ewan) ; Lloyd E (Elizabeth) ; Nicolson S (Stuart) Special Adviser ; [Redacted – S.38(i)(b)]; Ferguson SE (Shirley) ; [Redacted – S.38(i)(b)]**Subject:** Keatings v Adv Gen for Scotland -- note on hearing (OFF/SEN)PS/ Cabinet Secretary for the Constitution, Europe and External Affairs,
Copy list,

Keatings' case was heard yesterday and today, and concluded at around 2.40 pm this afternoon.

My notes on the two days are below. [Redacted - S.30(b)(i)]

[Redacted – S.38(i)(b)]

Notes on the hearing in Keatings v Advocate General for Scotland and Lord Advocate

- Lady Carmichael has indicated that she hopes to give her decision in "days not weeks". [Redacted - S.30(b)(i)]
- O'Neill was critical of both the UK and Scottish Governments for opposing the case, but reserved his most vehement attacks for the Scottish Ministers and the Lord Advocate, calling their behaviour at one point "unconstitutional" and "shameful". He accused Ministers and the Lord Advocate of deliberately seeking to delay the case, of trying to prevent the case from being heard through tactical manoeuvres, and even of abuse of process. He continued to put forward his theory that the Lord Advocate's position in the case somehow violates the separation of powers. [Redacted - S.30(b)(i)]
- [Redacted - S.30(b)(i)] Put short, his argument was that such a referendum could not relate to reserved matters since the holding of a referendum would not itself bring about the end of the Union or affect the powers of the UK Parliament (a 'no' vote being possible, as well as a 'yes' vote), and that even a vote for independence would not itself bring about the end of the Union, there being further negotiations and agreements to come before independence for Scotland was achieved. [Redacted - S.30(b)(i)]
- In the main, the Advocate General's counsel focused his arguments on why the court should decline to give an answer to the pursuer's question. He did, however, cover the UK Government's position on the competence of the Scottish Parliament legislating for an independence referendum. He argued that independence, achieved through a referendum, would relate to the UK Parliament, a reserved matter, since it would end that Parliament's ability to legislate for Scotland. He argued that Keatings was wrong, in any event, in suggesting that the test was whether a referendum would bring about a change in the UK Parliament's powers, but whether (whatever its effect) it would relate to the UK Parliament, which (he argued) even an 'advisory' referendum would.
- James Mure QC, for the Lord Advocate, emphasised that Scottish Ministers had withdrawn and the Lord Advocate was representing only himself and his interests in making his arguments. No arguments were made by him as regards the substantive point to do with the competence of the Scottish Parliament. He expressed the Lord Advocate's concern in general that cases of this type would undermine the ability of government and Parliament to make policy and develop laws, of whatever type, on any subject matter. He argued that the court was being drawn into adjudicating on matters as abstract as manifesto commitments, which could be about anything or at any stage of development.
- In his final comments, O'Neill returned to his broadest and most ambitious points: that before the upcoming election, those voting in it have the legal right to know whether they are electing a Parliament with the ability to hold an independence referendum, or not. He sought to place this argument in the context of democracy, and of the Scottish constitutional tradition, and as part of the sequence of Brexit-related cases of recent years where individuals have (successfully) vindicated rights against the UK Government in the courts.

[Redacted – S.38(i)(b)]

Item 3:

From: [Redacted – S.38(i)(b)] On Behalf Of Permanent Secretary

Sent: 02 October 2020 10:37

To: DG Constitution and External Affairs <dgcea@gov.scot>; [Redacted – S.38(i)(b)]; Permanent Secretary <PermanentSecretary@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) [Redacted – S.38(i)(b)]; Curtis PS (Penelope) [Redacted – S.38(i)(b)]; Kellet M (Michael) [Redacted – S.38(i)(b)]

Subject: RE: FOI Trawl - draft referendum bill announced in PfG - objection/concern raised by civil servants - Response required by COP on 2 October

We do not hold any information for this question either.

Thanks so much

[Redacted – S.38(i)(b)]

From [Redacted – S.38(i)(b)] On Behalf Of DG Constitution and External Affairs

Sent: 01 October 2020 21:55

To: [Redacted – S.38(i)(b)] ; Permanent Secretary ; DG Constitution and External Affairs ; Rogers D (David) (Constitution and Cabinet Director) ; Curtis PS (Penelope) ; Kellet M (Michael) ; [Redacted – S.38(i)(b)]

Subject: RE: FOI Trawl - draft referendum bill announced in PfG - objection/concern raised by civil servants - Response required by COP on 2 October

Dear [Redacted – S.38(i)(b)]

I can confirm that neither myself [Redacted – S.38(i)(b)], the DG CEA office, or Ken hold any information within the scope of this request.

[Redacted – S.38(i)(b)]

From: [Redacted – S.38(i)(b)]

Sent: 29 September 2020 14:52

To: Permanent Secretary <PermanentSecretary@gov.scot>; DG Constitution and External Affairs <dgcea@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) [Redacted – S.38(i)(b)]; Curtis PS (Penelope) [Redacted – S.38(i)(b)]; Kellet M (Michael) [Redacted – S.38(i)(b)]

Subject: FOI Trawl - draft referendum bill announced in PfG - objection/concern raised by civil servants - Response required by COP on 2 October

Afternoon,

I am currently dealing with an FOI request relating to the announcement in the PfG that a draft referendum bill will be published, the full text of the request is below.

Copies of any correspondence (emails, texts, memos, minutes of calls, minutes of meetings and/or otherwise) where any civil servant raised any form of objection or concern at including the Referendums Bill in the Programme for Government 2020-21.

I would be grateful if you could check your records (both private office and any individual records for Perm Sec and DGCEA) and confirm if you hold anything within the scope of this request. For consistency, I would suggest everyone searches using the following terms –

- Referendums Bill
- Referendum
- Independence
- Indy Ref

Grateful for a response, including nil returns, **by close of play on Friday 2 October 2020.**

Many thanks,
[Redacted – S.38(i)(b)]

Item 4:

From: [Redacted – S.38(i)(b)] On Behalf Of Permanent Secretary

Sent: 02 October 2020 10:37

To: DG Constitution and External Affairs <dgcea@gov.scot>; [Redacted – S.38(i)(b)]; Permanent Secretary <PermanentSecretary@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) [Redacted – S.38(i)(b)]; Curtis PS (Penelope) [Redacted – S.38(i)(b)]; Kellet M (Michael) [Redacted – S.38(i)(b)]

Cc: [Redacted – S.38(i)(b)]

Subject: RE: FOI Trawl - draft referendum bill announced in PfG - reprioritisation of other work - Response required by COP on 2 October

[Redacted – S.38(i)(b)]

Thanks so much. To confirm, we do not hold any information.

Best

[Redacted – S.38(i)(b)]

From: [Redacted – S.38(i)(b)] On Behalf Of DG Constitution and External Affairs

Sent: 29 September 2020 15:06

To: [Redacted – S.38(i)(b)]; Permanent Secretary ; DG Constitution and External Affairs ; Rogers D (David) (Constitution and Cabinet Director) ; Curtis PS (Penelope) ; Kellet M (Michael) ; [Redacted – S.38(i)(b)]

Cc: [Redacted – S.38(i)(b)]

Subject: RE: FOI Trawl - draft referendum bill announced in PfG - reprioritisation of other work - Response required by COP on 2 October

Hi [Redacted – S.38(i)(b)]

Nice to hear from you. This is straightforward, since both the preparation of the PfG (which contained the reference) and the DG work on prioritisation (more generally) are matters on which I lead.

I can confirm that neither I, the DG office nor Ken hold any material relating to reprioritisation of other work in order for work to be undertaken on a draft referendums bill.

[Redacted – S.38(i)(b)]

From: [Redacted – S.38(i)(b)]

Sent: 29 September 2020 14:50

To: Permanent Secretary <PermanentSecretary@gov.scot>; DG Constitution and External Affairs <dgcea@gov.scot>; Rogers D (David) (Constitution and Cabinet Director) [Redacted – S.38(i)(b)]; Curtis PS (Penelope) [Redacted – S.38(i)(b)]; Kellet M (Michael) [Redacted – S.38(i)(b)]

Cc: [Redacted – S.38(i)(b)]

Subject: FOI Trawl - draft referendum bill announced in PfG - reprioritisation of other work - Response required by COP on 2 October

Afternoon,

I am currently dealing with an FOI request relating to the announcement in the PfG that a draft referendum bill will be published, the full text of the request is below.

From 1 May 2020 to present:

Copies of any correspondence (emails, texts, minutes of meetings, minutes of calls and/or otherwise) from civil servants that sets out that some areas of civil service work will need to be deprioritised for work to be undertaken on the referendums bill.

I would be grateful if you could check your records (both private office and individual records for Perm Sec and Ken) and confirm if you hold anything within the scope of this request. For consistency, I would suggest everyone searches using the following terms –

- Referendums Bill
- Referendum
- Independence
- Indy Ref

Grateful for a response, including nil returns, **by close of play on Friday 2 October 2020.**

Please note I am also about to send another email to a slightly wider group of colleagues with a trawl that is required for another FOI relating to a draft referendum bill. This will be with you shortly and will use the same search terms to identify information that may be within scope.

Many thanks,

[Redacted – S.38(i)(b)]