



Decision Notice 045/2024

WhatsApp and text messages

Authority: Scottish Ministers

Case Ref: 202101514 and 202101515

Summary

The Applicant, in two separate requests, asked the Authority for WhatsApp and text messages sent or received within specified periods by Cabinet Secretaries or Government Ministers on Government business. The Authority informed the Applicant that it did not hold the information requested. The Commissioner investigated and found that the Authority had breached FOISA by informing the Applicant that it did not hold any relevant information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (4) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner)

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.

Background

1. On 14 October 2021, the Applicant made two separate requests for information to the Authority:
 - The first request sought, for March 2021, any WhatsApp or text messages sent or received by any Cabinet Secretary of the time on Government business
 - The second request sought, for August 2021, any WhatsApp or text messages sent or received by any Government Minister on Government business.

2. The Authority responded, separately, to both requests on 11 November 2021 with a notice, under section 17 of FOISA, that it did not hold the information requested. The Authority explained that the information requested was not retained beyond business need in accordance with its standard records management practice and statutory data protection obligations.
3. On 15 November 2021, the Applicant wrote, separately, to the Authority requesting a review of its decision for both of his requests. The Applicant stated that he was dissatisfied with the respective decisions because he was concerned that they suggested WhatsApp and text messages, which may be relevant to Government business, are deleted within a couple of months or within a year, and that he believed the Authority did hold information relevant to his requests.
4. The Authority notified the Applicant of the outcome of its reviews on 7 and 8 December 2021, respectively, upholding its original decision for both requests.
5. On 13 December 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA for both of his requests. The Applicant stated that he was dissatisfied with the outcome of the Authority's reviews because it "defied belief" that it held no information relevant to his requests.

Investigation

6. The Commissioner determined that both applications complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. The Authority was notified in writing that the Applicant had made valid applications, and the cases were subsequently 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 Authority was invited to comment on both applications and to answer specific questions. These related to the searches carried out by the Authority to identify and locate any information falling within the scope of the Applicant's requests.
9. During the investigation, the Authority withdrew its reliance on section 17(1) of FOISA and expressed its intention to provide the Applicant with new responses to his requirements for review other than in terms of section 17(1).
10. The Authority subsequently issued a revised review response (covering both requests) to the Applicant, disclosing information to him and withholding some information under various exemptions under FOISA.

Commissioner's analysis and findings

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 17(1) – Notice that information is not held

12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject

to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.

13. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
14. As rehearsed earlier, the Authority, during the investigation, withdrew its reliance on section 17(1), issued a revised review response in terms other than section 17(1) and disclosed information to the Applicant.
15. The Commissioner can, therefore, only conclude that the Authority was not entitled to inform the Applicant, either in its initial request or in its review responses, that it did not hold information relevant to the requests in terms of section 17(1) of FOISA, and therefore breached section 1(1) of FOISA in doing so.

Handling of the request

16. In the circumstances, the Commissioner must comment on how the Authority handled the Applicant's requests, both in terms of its interpretation of the first request and the searches it carried out for both requests.

Interpretation of the first request

17. In its submissions, the Authority stated that it had limited its searches for the first request to individuals who were Cabinet Secretaries in March 2021 (the time period covered by the request) who remained Cabinet Secretaries in October 2021 (when the request was made).
18. The Authority explained that it had done so because the election in May 2021 had changed the make-up of the Cabinet between March 2021 and October 2021.
19. The Commissioner finds this interpretation inexplicable. Consequently, he considers that the Authority failed to reasonably interpret the Applicant's request, and therefore breached section 1(1) of FOISA in doing so.
20. During the investigation, the Authority accepted that the searches it had carried out were not sufficient to identify any information held by those individuals who were Cabinet Secretaries in March 2021, but were no longer Cabinet Secretaries in October 2021.
21. The Authority confirmed that the further searches it would carry out would fully address the terms of the request.

The searches carried out

22. In its submissions, the Authority provided copies of the internal emails sent to the relevant persons requesting they confirm whether any relevant information is held and their respective responses.
23. In those internal emails, the Authority wrote:

"A reminder that Government business related messages on Ministers' personal or work phones should only be retained for as long as required and then removed, therefore we expect any response is likely to be a NIL return."

24. The Commissioner is concerned, particularly given that the Authority subsequently withdrew its reliance on section 17(1) of FOISA and disclosed information to the Applicant, that the above requests were framed in a way that invited a negative response, and that some of the responses were returned very quickly.
25. The Commissioner can see no good reason why the information that has now been located was not capable of being identified at either the initial response or review outcome stage.
26. The Commissioner would therefore urge the Authority to ensure that it carries out adequate and proportionate searches in response to information requests to establish what information is held (or is not held), and that it is able to explain and evidence, if challenged, why those searches were reasonable and likely to identify all relevant information. Failure to do so undermines FOI law and the confidence of the public in its utility.
27. When issuing its revised review response to the Applicant, the Authority provided further submissions to the Commissioner where it noted the following failures in how it handled the Applicant's requests:
 - The original search requests sent to Ministerial private offices should have been clearer on the expectation that Ministers search their personal mobile devices for any information held relating to Government business, not just their Government devices
 - Clearer, specific guidance should have been provided at the time of the searches to ensure they were carried out properly first time
 - While not its intention, it acknowledged that the text in the search request may have appeared to be pre-empting the results of the searches and be construed as such
 - There was a lack of understanding of the relevant provisions of FOI law by some individuals being asked to conduct searches
 - Searches should extend to all storage locations likely to hold information, including, where appropriate, personal devices, and guidance to this effect should have been provided to those carrying out searches
 - Adequate records of the searches carried out during the original request were not kept, meaning it did not have enough evidence to be confident in the robustness of the searches at the point of appeal.
28. As a result of these failures, the Authority explained that the Ministerial Private Office, who deal with requests of this nature, have put in place a number of actions to improve their procedures when dealing with FOI requests seeking Ministerial WhatsApp and text messages, including:
 - providing guidance and information to newly appointed Ministers about their responsibilities when it comes to FOI requests and Government-related information on mobile messaging applications
 - increasing the resource available to deal with FOI requests within the Ministerial Private Office
 - introducing step-by-step guidance to support staff in responding to FOI requests

- working with the FOI unit to improve knowledge of handling, reviewing, redacting and applying exemptions appropriately to FOI responses, and on the best way to evidence Ministerial searches
- conducting one-to-one sessions with Ministers on the need for good record management, appropriate use of WhatsApp and other mobile messaging applications and how they relate to FOI
- writing to all Cabinet Secretaries and Ministers reminding them of the available guidance on FOIs, their responsibilities and how similar FOI requests will be approached in future
- delivering a series of FOI awareness and training sessions to potential FOI case handlers, including on how to undertake appropriate searches in response to an FOI request
- improving the trawl text that is sent to Ministers and their Private Offices to be clear on what is required and what locations should be searched, e.g. not just Government devices and ERDM (the Authority's corporate record system)
- building in evidence of searches undertaken by Ministers, so there is a clear audit trail
- providing support and advice early on in the FOI process to ensure staff understand their responsibilities and what they are being asked to do.

29. While the Commissioner welcomes these changes, he has nevertheless recorded the aforementioned failures in his case-management system and he will consider them further as part of his recently announced Level 3 intervention relating to the Authority.

Decision

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by the Applicant.

The Commissioner finds that, by incorrectly informing the Applicant that it did not hold information falling within the scope of the requests, the Authority failed to comply with section 1(1) of FOISA.

Given that the Authority has since issued revised review responses in terms other than section 17(1) of FOISA and has disclosed information to the Applicant, the Commissioner does not require the Authority to take any action in respect of this failure, in response to the Applicant's application.

The Applicant has the right to appeal to the Commissioner if he is dissatisfied with the revised review response.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner

27 March 2024

Appendix 1: Relevant statutory provisions

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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
- ...

17 Notice that information is not held

- (1) Where-
 - (a) a Scottish public authority receives a request which would require it either-
 - (i) to comply with section 1(1); or
 - (ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),if it held the information to which the request relates; but
 - (b) the authority does not hold that information,it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.
- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.
- ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c);
and
 - (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).