



Decision Notice 200/2024

Legal advice on legality of holding a further Scottish independence referendum

Authority: Scottish Ministers
Case Ref: 202201068

Summary

The Applicant asked the Authority for details of legal advice provided to the First Minister by the Lord Advocate regarding the legality of holding a further Scottish independence referendum without UK Government consent. The Authority refused to confirm or deny that it held the information on the basis that – if the information existed and were held – it would be exempt from disclosure and that it was not in the public interest to reveal whether the information existed.

During the investigation, the Authority changed its position and confirmed that it held the information. The Commissioner found that the Authority was not entitled to refuse to reveal whether the information existed or was held.

Relevant statutory provisions

[Freedom of Information \(Scotland\) Act 2002](#)¹ (FOISA) sections 1(1), (2) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 18(1) (Further provision as respects responses to request); 29(1)(c) (Formulation of Scottish Administration policy etc.); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 29 June 2022, the Applicant made the following request for information to the Authority:

¹ <https://www.legislation.gov.uk/asp/2002/13/contents>

I am requesting details of the legal advice provided to the First Minister by the Lord Advocate in respect of the legality of holding a further referendum regarding Scottish Independence, without UK Government consent.

I acknowledge the potential for such information to be withheld, as legally privileged; however, I believe that any withholding of such information would be outweighed by the public interest in its release. Indeed, the First Minister, in referring the question to the Supreme Court, has made it clear that the ensuing decision of the Court would effectively become a matter of public record, since her resulting plans are contingent upon the outcome.

2. The Authority wrote to the Applicant on 15 July 2022 asking him to clarify the time period which the search for information should cover.
3. On 17 July 2022, the Applicant clarified that the timeframe of one year to the date of the request could be utilised.
4. The Authority responded on 12 August 2022. In terms of section 18(1) of FOISA, it refused to confirm or deny whether the requested information existed or was held by it. The Authority also stated that, if the information did exist or was held, an exemption under section 29(1)(c) of FOISA would apply.
5. On 15 August 2022, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the Authority's decision to rely on section 18 because, in his view, it was incumbent on the Scottish Government to properly consider matters such as that in question before any onward referral to a higher authority. By refusing to either confirm or deny the existence of the information seemed, to him, obtuse. He believed that there was an over-riding public interest in the disclosure of the information, given its media attention and the implications for the integrity of the UK pending the Supreme Court's decision.
6. The Authority notified the Applicant of the outcome of its review on 12 September 2022 fully upholding its original decision.
7. On 25 September 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Authority's review because he disagreed that section 18 of FOISA applied. In support of his view, he argued that, at the time of his request, it was already known that the matter was being referred to the Supreme Court and further, since making his request, information in the public domain indicated that exchanges had taken place between the Lord Advocate and the First Minister on the legality of a referendum that did not have UK Government consent. The Applicant maintained that the public interest lay in the disclosure of the information requested. He argued that this was an exceptional case, given the related media coverage, the involvement of the Supreme Court and the considerable consequences that would likely ensue from its ruling.

Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 20 October 2022, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.

10. The Authority provided its initial comments on 13 January 2023, maintaining its position at review. The case was subsequently allocated to an investigating officer.
11. Following consideration of the Authority's initial comments, the Investigating Officer invited the Authority to provide further comments and to answer specific questions. These focussed on the Authority's justification for neither confirming nor denying whether it held the information requested.
12. The Authority responded on 27 June 2024 confirming that it was now withdrawing its reliance on section 18 of FOISA.
13. On 26 July 2024, the Authority provided the Applicant with a revised review outcome. The Authority confirmed that it held the information requested and that it was fully withholding that information under section 29(1)(c) of FOISA.
14. The Applicant confirmed receipt of the Authority's revised review outcome, but informed the Commissioner that he wished a decision issued in this case.

Commissioner's analysis and findings

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

Section 18(1) – "neither confirm nor deny"

16. Section 18(1) of FOISA allows Scottish public authorities to refuse to confirm or deny whether they hold information in the following limited circumstances:
 - (i) a request has been made to the authority for information which may or may not be held by it; and
 - (ii) if the information existed and was held by the authority (and it need not be), it could give a refusal notice under section 16(1) of FOISA, on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38, 39(1) or 41 of FOISA; and
 - (iii) the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
17. As stated above, during the investigation, the Authority informed the Commissioner that it was withdrawing its reliance upon section 18(1) of FOISA. It confirmed that its position at review stage, i.e. to rely on section 18(1), was incorrect.
18. The Authority acknowledged that the unusual circumstances in this case meant that the reference to the Supreme Court would be considered, by most people, as highly likely to have involved the provision of Law Officer advice to Ministers.
19. The Authority noted the continued public interest generally in preserving the Law Officer Convention, including that in not confirming whether and when Law Officers had been consulted [paragraph 2.39(b) of the [Scottish Ministerial Code](#)²]. It accepted, however, the strength of the public interest against the continued use of section 18 in this case, given the

² [Scottish Ministerial Code: 2023 Edition - gov.scot \(www.gov.scot\)](#)

material concerned with the Law Officers' confidence in the competence of a draft Bill having been published before 12 August 2022.

20. The Authority subsequently issued the Applicant with an alternative response, otherwise than in terms of section 18 of FOISA.
21. In the circumstances, the Commissioner must conclude that the Authority does not consider itself to have been entitled to rely upon section 18 when it responded to the Applicant's request for review. As a result, the Commissioner finds that the Authority failed to comply with section 1(1) of FOISA in responding to the Applicant's request in terms of section 18. Given that the Authority has provided a further response to the Applicant, the Commissioner does not require the Authority to take any action.

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 request made by the Applicant.

He finds that the Authority was not entitled to refuse to reveal, in terms of section 18 of FOISA, whether the requested information existed or was held by it.

Given that the Authority has since confirmed to the Applicant that it does hold the information requested, the Commissioner does not require the Authority to take any action in response to this failure, in response to the Applicant's application.

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

16 September 2024