

OPINION OF COUNSEL

for

THE SCOTTISH INFORMATION COMMISSIONER

I refer to instructions sent to me on 4 August 2022.

1. I am asked for my views on the application of the Freedom of Information (Scotland) Act 2002 ('FOISA') to independent advisers. The particular issue is, where such advisers are appointed in order to carry out an independent investigation, whether the information they obtain or create in the course of that investigation is held by them alone or also held by the public authority which appointed them. The issue is, in short, whether in terms of s 3(2) of FOISA that information is 'held' by the public authority which appointed the advisers.

Background

2. On 13 January 2019 the First Minister referred to the independent advisers on the Scottish Ministerial Code ('the Code'), the question whether she had acted in compliance with it. James Hamilton, one of the advisers, was appointed to carry out an investigation in order to answer that question. In doing so, he was assisted by a number of Scottish Government civil servants appointed to a secretariat for the specific purposes of the investigation. The Scottish Information Commissioner is dealing with an application arising from a request to the Scottish Ministers (who are a public authority under FOISA Sch 1 para 1) for all written evidence received by Mr Hamilton in the course of carrying out his investigation.
3. The Scottish Ministers withheld the information in reliance on the exemption under s 30(c) of FOISA, prejudice to the effective conduct of public affairs. In response to the applicant's application to the Commissioner, the Scottish Ministers now maintain that they do not hold information held by or on behalf of Mr Hamilton for purposes of his investigation.
4. Both the remit of the investigation and its report (in redacted form) have been published, the latter on 22 March 2021. The remit of the investigation noted that, if required, redactions would be made to the report to remove the risk of any complainer being

identified and to ensure compliance with the terms of the court order made in related criminal proceedings.

5. For purposes of preparing this advice, I have seen the following:
 - a. A letter dated 8 July 2015 appointing Mr Hamilton to act as an independent adviser on the Code;
 - b. A minute dated 15 March 2021 setting out the duties of staff appointed to the secretariat of the investigation; this includes the remit of the investigation;
 - c. A note dated 18 August 2020 to ██████████, who ██████████, setting out the terms on which secretariat support was to be provided to Mr Hamilton;
 - d. An undated statement by ██████████ setting out her understanding of the relationship of the secretariat with the Scottish Government; and
 - e. The First Minister's referral to the independent advisers.
6. The following passages from the first four of these documents seem to me to be important in addressing the Commissioner's questions:
 - a. Mr Hamilton's appointment letter: 'Your role is to act as a source of independent advice on matters relating to the Scottish Ministerial Code, where I feel it appropriate to refer such matters to you.'
 - b. Minute to secretariat staff:
 - i. § 5: 'Mr Hamilton's role is independent of the Scottish Government. For your work in the Secretariat you will report to him and not to Ministers or your normal line managers.'
 - ii. § 6 emphasizes that 'it is of the highest importance that you take all necessary steps to protect his independence and the confidentiality of his inquiry' and stipulates that staff should not share any documents or drafts of the report, or discuss the evidence taken, with anyone outside the secretariat.
 - iii. The remit for the investigation (which is attached) includes in § 5: 'Provide the Deputy First Minister with a report setting out the findings and conclusions' with regard to whether the Code is engaged, whether it has been breached and, if so, the appropriate remedy or sanction.
 - c. Note to ██████████:
 - i. § 4: '[T]here are a number of important aspects that you will need to ensure are in place for the proper conduct of the referral'.

- ii. § 5: ‘Mr Hamilton’s role is independent of the SG. He is free to follow the evidence as he considers necessary in order to finalise his report. In supporting Mr Hamilton it is of the highest importance that you take all necessary steps to protect that independence.’
- iii. § 6 is headed ‘ministerial oversight’ and explains that the First Minister has delegated responsibility for overseeing this referral to the Deputy First Minister.
- iv. § 10: ‘Information created in the course of the referral should be held securely on behalf of Mr Hamilton. You will wish to consider creating a restricted access folder’
- v. § 12: ‘You should seek advice from the FoI unit in respect of the application of FoI to information held by the Scottish Government on behalf of Mr Hamilton.’

d. Statement by [REDACTED]:

- i. ‘I understood that it would be inappropriate for any Ministers or other civil servants to have any form of influence or oversight of the investigation process or the conclusions Mr Hamilton came to; this would have negated the purpose of the investigation.’
- ii. She explains that (as envisaged in § 6.c.v above), she sought clarification from the FOI Unit: ‘We agreed that I was acting independently in my role of [REDACTED] and FOI matters received by Mr Hamilton would be treated on that basis. We also agreed that material relating to the investigation was held on behalf of Mr Hamilton, rather than the Scottish Government.’
- iii. The clarification sought related only to the initial set-up of the investigation.
- iv. ‘I took direction on day to day actions from Mr Hamilton, and did not share details of the progress of the investigation with the Scottish Government or with any other person or organisation, save where Mr Hamilton had specifically authorised me to provide an update.’

7. Before I turn to the questions, I think it may be worth repeating the conclusions I reached on the interpretation of s 3(2) of FOISA in advice I gave to the Commissioner dated 21 June 2020. In § 30 of that advice I summarized my conclusions from the case law as follows:

‘It may be helpful to list the main factors which are likely to be relevant to the question whether a public authority ‘holds’ information. This is a non-exhaustive list, since depending on particular circumstances there may be other specific factors which are of importance:

- a. an appropriate connexion with the authority, which means that the information is for the purposes of carrying out its functions as a public authority;
 - b. the substantive content of the information;
 - c. the circumstances in which it was created;
 - d. whether the authority has read, edited, relied upon or otherwise made use of the information;
 - e. the legal relationship between the authority and the person who has the information; this may be but need not be an agency relationship formalized in a contract;
 - f. the authority’s knowledge that a person is holding information for it;
 - g. any restrictions on the authority’s access to the information; again this may depend on examining the contractual relationship between the authority and the person who has the information;
 - h. the location of the information.’
8. As Coppel, *Information Rights* (4th edn) § 9-009 notes, the Freedom of Information legislation has avoided technicalities which arise in the law of disclosure; and the question whether a public authority holds information is fundamentally a factual one. The Inner House in *Graham v SIC* [2019] CSIH 57 at § 15 noted that in construing the word ‘hold’, there should be no scope for the introduction of technicalities, unnecessary legal concepts which would restrict the disclosure of relevant information.

Question 1: Does Senior Counsel consider the independent adjudicators, either generally or for the purposes of the investigation under consideration here, to be sufficiently independent of the Ministers to be regarded as a wholly separate entity, not part of the Ministers for the purposes of FOISA?

Question 2: Can Senior Counsel identify any other reason why the independent adjudicators should be considered subject – or not subject – to FOISA?

9. It is convenient to deal with the first two questions together.
10. In my opinion, the critical issue for present purposes is not whether the independent advisers are to be regarded as a separate entity but whether the information which Mr Hamilton holds is, for purposes of s 3(2) of FOISA, held by the Scottish Ministers.

11. In my view, on the basis of the facts and the factors summarized above, the information is held by the Scottish Ministers. The main grounds on which I reach this view are the following.
12. The investigation was instructed by the First Minister. In accordance with § 1.7 of the Code its purpose is to advise her in order that she may form a judgment as to ‘any action required in respect of ministerial conduct’. Given the particular circumstances of the present referral, the remit in this case provided that the report of the investigation should be submitted to the Deputy First Minister. The investigation was subject to ‘ministerial oversight’, albeit it is made clear that secretariat staff should not disclose information outside the secretariat itself. The report was published on the Scottish Government website.
13. Compliance with the Code is in my opinion a matter in which the Scottish Ministers collectively have an interest. The Code itself emphasizes the duties incumbent on ministers and their collective responsibility. This investigation was instructed and carried out, evidence was obtained, and the report produced, for the purpose of considering whether a minister’s conduct complied with the Code and deciding on appropriate sanctions if it did not. Information was obtained or created for that purpose. That in my view amounts to an appropriate connexion with the Scottish Ministers such that the information in question is ‘held’ by them in terms of s 3(2) of FOISA.
14. The points made in the previous two paragraphs reflect factors a, c, d, f, and h in the list set out in § 7 above, all of which appear to be satisfied (on b, substantive content, I cannot form a view since I have not seen the information).
15. The material produced by the Scottish Government, summarized above, stresses the importance of confidentiality within the secretariat in order to preserve the integrity of the investigation process and its conclusions. Does this alter the conclusion?
16. In my opinion, it does not.
17. First (and for present purposes least importantly), the rationale of preserving the integrity of the investigation no longer applies in the same way once conclusions have been reached and the report has been published.
18. Second, it is clear (as discussed in my earlier opinion) that there can be cases in which the access of a public authority to information is restricted, for example by the terms of a contract into which it entered with the person who holds the information. In cases of that kind, the correct conclusion may be that the authority does not hold the information.

19. In my opinion, the situation here is different. The staff of the secretariat work for the Scottish Government. Any restrictions on information security or disclosure imposed on them have been imposed by more senior officials of the Scottish Government. The restrictions could, if so desired, be lifted by the same or other senior officials. In other words, there is nothing in the restrictions under which the secretariat staff worked which binds the Scottish Government: it chose to impose them, and it could choose to lift them. This does not, in my view, constitute a relevant restriction on access to information which has the effect that information is not held by the Scottish Government. (These points reflect factors e and g in the list set out in § 7 above, pointing to the lack of any relevant restriction on access to the information.)
20. Third, for essentially the same reasons, what is described as an agreement reached between the FOI Unit and the secretariat that investigation materials should be held by Mr Hamilton rather than by the Scottish Ministers does not in my view affect the answer to the question whether, on a proper construction of s 3(2) of FOISA, the Scottish Ministers 'hold' that information. On the grounds set out above, in my opinion they do.
21. Finally, at first glance the conclusion that information obtained or created in an investigation conducted independently and confidentially is 'held' by the Scottish Ministers might seem surprising. It is, however, worth noting that what emerged from that investigation was a published report, albeit one published with redactions. That helpfully underlines the fact that a conclusion that information is 'held' is not the end of the road. It remains open for the Scottish Ministers to assert appropriate exemptions in relation to the information sought. The exemption under s 38 in relation to personal information will no doubt be relevant. Others may be too.

Question 3: Does Senior Counsel consider the secretariat allocated to the investigation in the case under consideration here can properly be regarded as wholly separate from the Ministers for the purposes of FOISA? If not wholly separate, does Senior Counsel consider there to be any justification for concluding that the Ministers have no material interest, for the purposes of FOISA, in the information held by the secretariat.

22. In my view, for the reasons set out above, even if the information in question is held by Mr Hamilton, it is also held by the Scottish Ministers, because they have an interest in it. (For essentially the reasons set out in § 19 above, I doubt whether it makes sense to seek to separate the secretariat established by the Scottish Ministers from the Scottish Ministers themselves.)

23. As my instructions note, the Inner House in *Graham v SIC* [2019] CSIH 57 concluded in § 18 that information was held not only by a returning officer, who was entirely independent of the local authority for whose area he was appointed, but also by the local authority itself because it too had an interest in it. The local authority's interest related to the need to check that payments claimed were in fact due (see § 17). In the present case, although Mr Hamilton is independent of the Scottish Government, in my opinion the Scottish Ministers too have an interest in the information in question for the reasons set out in §§ 12-13 above.

Question 4: Can Senior Counsel identify any other basis for concluding that information held by the secretariat (alone) should not be considered held by the Ministers?

24. No. Please see §§ 15-21 above.

Question 5: Does Senior Counsel have anything to add on the question whether information of the kind sought by the applicant in this case should be regarded as information held by the Ministers for the purposes of section 3(2) of FOISA?

25. I have nothing further to add.

Question 6: Does Senior Counsel require any further information to answer any of the foregoing questions?

Question 7: Does Senior Counsel have any additional observations which are not covered in the specific questions?

26. No. I do not believe I require further information and have nothing further to add.

Advocates Library
Edinburgh

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