

Decision Notice 010/2020

Internal communications about FOI Intervention

Applicant: The Applicant
Public authority: Scottish Ministers

Case Ref: 201900161



Scottish Information
Commissioner

Summary

The Ministers were asked for internal communications relating to an intervention carried out by the Scottish Information Commissioner. The Ministers told the requester they held no information falling within the scope of his requests.

As information was identified during the investigation that fell within one of the requests, the Commissioner found that the Ministers did not comply with FOISA in responding to one the requests. However, the Commissioner accepted that the Ministers did not hold information in relation to the other request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Information not held)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. Both Appendices form part of this decision.

Background

1. On 3 August 2018, following dialogue with the Scottish Ministers (the Ministers) regarding the framing of these requests (as set out in paragraph 11), the Applicant made a four-part request for information to the Ministers. The requests are set out in full in Appendix 2. This decision focusses on two of those requests, which were for all internal communications, from 1 June 2017 to 20 June 2018, between Ministers, Special Advisers and communication staff in relation to:
 - the letter, published on 1 June 2017, by CommonSpace and The Ferret, raising concerns of journalists regarding the Scottish Government's FOI policies [request 3] and
 - the Commissioner's intervention into the Scottish Government's handling of FOI requests from 01/06/2017 to 20/06/2018 [request 4]
2. The Ministers responded separately to each of these requests on 31 August 2018. They stated that they did not hold some of the information requested (requests 3 and 4), but also advised, in relation to request 4, that some information was available on their website, and that section 25(1) (Information otherwise accessible) of FOISA applied to that information.
3. On 6 September 2018, the Applicant wrote to the Ministers requesting reviews of their decision. He did not accept that the information was not held and suggested that the Ministers had misinterpreted his request.
4. The Ministers notified the Applicant of the outcome of their review of both requests on 2 October 2018. They confirmed their initial decisions that no information was held for either request. They explained that their searches had included search terms which would have found individual or collective references in the three categories of individuals referenced in the requests.
5. On 24 January 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the

outcome of the Ministers' reviews as he believed the Ministers had handled the original requests incorrectly by claiming that they did not hold information. He was also dissatisfied with the overall handling of his requests.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made requests for information to a Scottish public authority and asked the authority to review its response to those requests before applying to him for a decision.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions.
8. The Ministers acknowledged that they had incorrectly claimed that no information was held in relation to request 4.
9. On 17 April 2019, the Ministers provided another response to the Applicant and disclosed some of this information, but also withheld other information under section 30(b) of FOISA (Prejudice to effective conduct of public affairs). This response has also been appealed to the Commissioner and is considered in a separate decision.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Background

11. The Applicant had previously made a series of requests to the Ministers on the subject of the Commissioner's intervention. The Ministers had refused similarly worded requests on the ground of excessive cost (section 12 of FOISA). In doing so, the Ministers had also suggested to the Applicant that he could narrow his request by specifying a business area. As a result of this advice, the Applicant accepted the wording suggested and made this four-part request.
12. On 2 August 2018, the Applicant submitted to the Ministers:

“...the best way to ensure that I am able to access all of the information I seek would be to split the two existing requests again, asking for any information held by the FOI unit in relation to the specified topics and separately asking for any communication between ministers SPADs and Comms officials related to the specific topics.”
13. The exact wording of the requests were drafted by the Ministers and accepted by the Applicant on 3 August 2018.
14. The Commissioner acknowledges that the wording of the requests creates an artificial division between the Ministers and the FOI unit. The FOI Unit is part of the public authority itself. FOISA relates only to Scottish public authorities – in this case, the Ministers. Whilst the distinction arose in the context of advice and assistance, the Commissioner does not think this distinction has facilitated the dealing with the request. Nonetheless, it was a suggestion that the Applicant agreed to. It is within this context that he has considered the Ministers' handling of these requests.

Section 17 – Information not held

Request 3 – letter of 1 June 2017

15. In their submissions, the Ministers confirmed that they were relying on section 17 in response to this request.
16. 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, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
17. The Applicant questioned how the Ministers had interpreted his request. He suggested that they had interpreted his request narrowly and, therefore, not located all the information.
18. The Ministers were asked to explain how they established if any information was held in relation to this request and to describe the searches carried out, including records searched and any keywords and other search parameters used.
19. The Ministers explained that they interpreted both requests to include direct communications *between all or any combination* of (Ministers' emphasis) the following groups: Special Advisers, Communications staff and Ministers, where staff within these areas were direct senders or recipients of that communication. The Ministers evidenced their interpretation by giving the Commissioner their internal communications, made at the time of dealing with the Applicant's request.
20. To support their submission, the Ministers provided the Commissioner with their completed search template. This search template detailed:
 - (i) the areas searched (Ministerial inboxes, their electronic document management system (Erdm), relevant staff inboxes and hard copy searches) and
 - (ii) the search parameters used (timeframe, CommonSpace and Ferret).The template also provided details of the search returns. These searches excluded the FOI unit as a business unit due to the interpretation of the requests as set out above.
21. In addition, the Ministers provided the Commissioner with internal correspondence detailing the searches requested.
22. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining whether a Scottish public authority holds information, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
23. Having considered all the relevant submissions, the Commissioner accepts that the Ministers did not hold the information at the time of the request. In this context, it is clear to the Commissioner that in assessing whether they held the information the Ministers consulted the most appropriate staff and those with experience of the subject, reducing the likelihood of relevant information being overlooked.
24. The Commissioner finds that the Ministers complied with Part 1 of FOISA in responding to request 3. In reaching this conclusion, the Commissioner has taken into account that the

Ministers have provided some information to the Applicant in relation to requests 1 and 2, which are also subject to appeal to the Commissioner and which is considered in a separate decision.

Request 4 – the Commissioner’s intervention

25. During the investigation, the Ministers acknowledged that they were not entitled to respond under section 17(1) of FOISA in response to request 4 as they had identified information that fell within its scope. The Ministers provided another review response to the Applicant during this investigation.
26. The Commissioner finds that, by stating they held no recorded information for request 4, the Ministers failed to comply with Part 1 of FOISA.
27. Having received this new response, on 20 May 2019 the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Ministers' review as he believed the Ministers had wrongly withheld information. The Applicant's dissatisfaction at the information being withheld is considered in a separate decision.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by the Applicant considered in this decision.

He finds that the Ministers complied with FOISA in responding to request 3.

However, by that by stating that they held no recorded information for request 4, the Ministers failed to comply with Part 1 of FOISA, in particular section 1(1). Given that the Ministers have provided another response to the Applicant during the investigation in respect of request 4, the Commissioner does not require the Ministers to take any action in respect of this failure.

Appeal

Should either the Applicant or the Ministers 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.

Margaret Keyse
Head of Enforcement

23 January 2020

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.

...

- (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

...

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.

...

Appendix 2

1. All internal communications held by the FOI unit involving Scottish Ministers, Special Advisers and communication staff in relation to the letter, published 1/6/17 by CommonSpace and The Ferret and widely covered both in the media and parliament, raising concerns of journalists regarding the Scottish Government's FOI policies. The time frame for this request is 01/06/2017 to 20/06/2018.
2. All internal communications held by the FOI unit involving Scottish Ministers, Special Advisers and communication staff in relation to the [Commissioner's] intervention into the Scottish Government's handling of FOI requests, announced in November 2017 and for which the final report was published on 13/6/18. The time frame for this request is 01/06/2017 to 20/06/2018.
3. All internal communications between Special Advisers, Communications staff and Ministers in relation to the letter, published 1/6/17 by CommonSpace and The Ferret and widely covered both in the media and parliament, raising concerns of journalists regarding the Scottish Government's FOI policies. The time frame for this request is 01/06/2017 to 20/06/2018.
4. All internal communications between Special Advisers, Communications staff and Ministers in relation to the intervention into the Scottish Government's handling of FOI requests, announced in November 2017 and for which the final report was published on 13/6/18. The time frame for this request is 01/06/2017 to 20/06/2018.

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