

Decision Notice

Decision 158/2018: Mr Y and the Scottish Ministers

Evidence of threats

Reference No: 201800820

Decision Date: 10 October 2018



Scottish Information
Commissioner

Summary

The Ministers were asked for the evidence upon which a named Minister found that certain claims were a matter of allegation as opposed to fact.

The Ministers stated that they did not hold the requested information.

The Commissioner was satisfied that the Ministers had carried out appropriate searches and did not hold the requested information.

Relevant statutory provisions

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

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 2 October 2017, Mr Y made a request for information to the Scottish Ministers (the Ministers). Mr Y stated that, in a letter to an MSP, a named Minister described threats levelled against him (i.e. against Mr Y) by criminals as a matter of allegation. Mr Y asked for the evidence upon which the named Minister “finds his claim the threats levelled against me are a matter of allegation as opposed to fact.”
2. The Ministers responded on 20 October 2017. The Ministers stated that they did not hold any information that caused them to doubt the accuracy of the High Court transcript that Mr Y had provided with his request. They also stated that the question of whether the witness in the case had uttered a criminal threat was a matter that could only be determined by a court of law and not something that it would be appropriate for the Ministers to take a view on.
3. On 11 December 2018, Mr Y wrote to the Ministers requesting a review of their decision. He was dissatisfied that the information he had requested had not been provided and considered that no valid reason had been offered for this failure.
4. The Ministers notified Mr Y of the outcome of their review on 24 April 2018. They upheld their original decision with modifications. The Ministers stated that they did not have the information requested, and that their earlier response should have advised (under section 17 of FOISA) that they did not hold the information.
5. On 14 May 2018, Mr Y applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Y did not accept that the Ministers did not hold any relevant information. He asked how the named Minister had come to conclude that the threats against him were a matter of allegation as opposed to fact, if no information was held. Mr Y wanted to know the basis for the Minister’s assertion.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Y made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 22 June 2018, the Ministers were notified in writing that Mr Y had made a valid application.
8. 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 answer specific questions. These questions focussed on the searches undertaken by the Ministers. The Ministers responded on 30 July 2018.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both Mr Y and the Ministers. He is satisfied that no matter of relevance has been overlooked.
10. 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 subject to qualifications, but these are not applicable in this case. If no such information is held by the authority, section 17(1) of FOISA requires the public authority to give the applicant notice in writing to that effect.
11. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, 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.

The Ministers' submissions

12. The Ministers explained that, with his request, Mr Y had forwarded excerpts from court transcripts of a trial which contained a statement which he considered to be a "criminal threat" against him.
13. The Ministers submitted that the statement (from the named Minister) "did not depend on any information that the Scottish Government held, beyond the fact that Mr Y raised the threats in correspondence about the failure of the police to act on his report of these alleged criminal threats". The Ministers stated that they therefore knew, or at least reasonably assumed, that nobody had been prosecuted or convicted on this matter. The wording "alleged criminal threats" used by the named Minister reflected the fact that there had been no prosecution or conviction.
14. The Ministers submitted that it would be inappropriate for the Minister to express any view on whether the material that Mr Y had provided in terms of the trial transcript does or does not amount to evidence that a crime may have been committed. The Ministers do not dispute the accuracy of the court transcripts that Mr Y provided, and confirmed that the question of whether these transcripts prove that a witness committed a criminal offence, either taken on their own or together with other evidence, is one that can only be determined by a court of law and is not something that the Scottish Ministers can express a view on.

15. The Ministers stated that this is properly a matter for Police Scotland and the Crown Office and Procurator Fiscal Service to investigate and, ultimately, if there is a prosecution, for a court of law to determine. In the absence of this due process and the completion of any criminal investigation, they were satisfied that the named Minister and Scottish Government officials correctly referred to “alleged threats”.
16. The Ministers explained that, because of the circumstances outlined above, they had not considered it appropriate to carry out keyword searches of their electronic records management system: the statement made by the named Minister did not depend on any information that the Scottish Government held.

The Commissioner’s conclusions

17. The Commissioner can only consider what recorded information is actually held by the Ministers, not what information they might be expected to hold.
18. Having considered all the relevant submissions and the information requested by Mr Y, the Commissioner is satisfied with the Ministers’ explanations as to why they do not hold any relevant recorded information.
19. The Commissioner is satisfied that the statement from the named Minister in a letter to an MSP is not based on recorded information held by the Ministers, but reflected the fact that there have been no prosecutions or convictions relating to the matters raised by Mr Y.
20. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that the Ministers do not (and did not, on receiving the request), hold any information falling within the scope of Mr Y’s request.

Decision

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Y.

Appeal

Should either Mr Y 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

10 October 2018

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 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.

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