

Decision Notice

Decision 160/2015: Mr James Duff and the Scottish Ministers

Changes to legal procedure

Reference No: 201500708

Decision Date: 13 October 2015



Scottish Information
Commissioner

Summary

On 18 February 2015, Mr Duff asked the Scottish Ministers (the Ministers) for any new legislation which changed the procedure to allow a debate to be fixed in the legal proceedings known as Lawburrows.

The Ministers told Mr Duff they did not hold any information about this, and explained why. Following a review, Mr Duff remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner was satisfied that the Ministers did not hold the information Mr Duff asked for.

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. It may be helpful to explain that, on 18 February 2015, Mr Duff wrote to the Ministers in connection with court proceedings at Dumfries Sheriff Court, which were later the subject of an appeal to the Court of Session. When writing about the case, his letter also contained an information request which is the subject of this decision.
2. Mr Duff asked for a “copy of any new legislation by the Scottish Government that changed the procedure to allow a debate to be fixed, rather than make a hearing essential, in Lawburrows”. Lawburrows is an ancient Scots Law remedy relating to threats of violence.
3. The Scottish Ministers responded on 23 February 2015, issuing a notice in terms of section 17(1) of FOISA. They told Mr Duff they did not hold the information and that they had no requirement to do so.
4. On 24 February 2015, Mr Duff wrote to the Ministers requiring a review of their decision. He expected the information to be held.
5. The Ministers notified Mr Duff of the outcome of their review on 24 February 2015, confirming their original decision without modification.
6. On 13 April 2015, Mr Duff wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Duff stated he was dissatisfied with the outcome of the Ministers’ review, challenging their assertion that no information was held.

Investigation

7. The application was accepted as valid. The Commissioner confirmed that Mr Duff made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
8. On 5 June 2015, the Ministers were notified in writing that Mr Duff had made a valid application. The case was allocated to an investigating officer.
9. 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, focusing on the steps taken to establish whether any relevant information was held. The Ministers responded on 20 July 2015.
10. Mr Duff also provided further comments during the investigation.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to her by both Mr Duff and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 17 – Notice that information is not held

12. 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 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.
13. The Ministers informed Mr Duff that they did not hold the information he requested and commented that they would have no reason to record any information relating to his court action against another party, or any changes which might have affected it.
14. The Ministers were asked to comment on Mr Duff's assertion that they had refused to answer his request. The Ministers explained that their response to him was an attempt to provide an expanded reason for refusal, by way of advice and assistance, rather than simply saying the information was not held. This appears to the Commissioner to be a fair reflection of their response.
15. Mr Duff attempted to explain his understanding of the current procedure for Lawburrows. However, the only question the Commissioner can consider here is whether the Ministers, on receiving Mr Duff's request, held the information he asked for. It is not for the Commissioner to determine whether there has been a change in the law.
16. The Ministers explained that they were unaware of any changes to the relevant procedures. They would only expect to hold information on such changes in the context of their involvement in a particular court action. They had not requested or caused any amendment to the relevant legislation.
17. The Ministers went on to explain that they did not hold copies of legislation, but rather relied on various online platforms such as "Westlaw" and "legislation.gov.uk" to access legislation as and when required. In other words, they would not ordinarily hold or expect to hold the kind of information Mr Duff was seeking. The law on Lawburrows might have been changed

by a judicial decision, but (as they had not been involved in any such proceedings) they would need to search the online resources mentioned to confirm this. In the absence of such a search, they held no record of any change.

18. The Commissioner has considered all the relevant submissions she has received in this case. In other cases, she might require more by way of evidence of the steps taken by a public authority in concluding that it does not hold the requested information. In this case, however, she accepts as reasonable in the circumstances the Ministers' conclusion that they did not hold, and would not expect to hold, the information requested by Mr Duff. Information held by Scottish public authorities does not include the contents of the World Wide Web, and the function of FOISA is to provide access to information held by those authorities rather than to facilitate the provision of legal advice to members of the public. In all the circumstances, therefore, the Commissioner is satisfied that the Ministers were entitled to conclude that they did not hold the information requested by Mr Duff.

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 Duff.

Appeal

Should either Mr Duff or the Scottish 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

13 October 2015

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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