

Decision Notice



Decision 161/2011 Mr Eddie Cairns and the Scottish Ministers

Procedure for addressing failures by the Lord Advocate

Reference No: 201101082

Decision Date: 12 August 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr Cairns asked the Scottish Ministers (the Ministers) for information relative to procedures for addressing failures by the Lord Advocate. The Ministers failed to respond until Mr Cairns requested a review, when Mr Cairns was informed that no information was held. Mr Cairns remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner accepted that the Ministers held no information falling within the scope of the request. He did not require the Ministers to take any action.

Relevant statutory provisions and other sources

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

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. Mr Cairns has been in correspondence with the Ministers over a period of time regarding various aspects of the Scottish justice system. On 11 March 2011, Mr Cairns wrote to the Ministers in the following terms:
If the Lord Advocate knowingly fails in his or her duties to uphold the law and the administration of justice in the name of the Crown, what is the appropriate course of action to hold him or her to account?
2. On 11 April 2011, having received no response to his request, Mr Cairns wrote to the Ministers requesting a review of their failure to reach a decision on the request.
3. Mr Cairns did not receive a response to his requirement for review and, on 13 May 2011, wrote to the Commissioner, stating that he was dissatisfied with the Ministers' failure to reach a decision, and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.



4. As a result of this application, the Commissioner issued *Decision 126/2011 Mr Eddie Cairns and the Scottish Ministers*, which found that the Ministers had failed to respond to the request or request for review within the appropriate timescales.
5. The Ministers notified Mr Cairns of the outcome of their review on 8 June 2011. They informed Mr Cairns that, as the Scottish Government was not responsible for investigating complaints against the Lord Advocate, they had no reason to record the information requested. In the circumstances, they did not consider Mr Cairns to have made a valid request for information under FOISA. They went on, however, to explain their understanding of the appropriate arrangements for dealing with allegations against the Lord Advocate. They understood their response to be in line with previous advice given to Mr Cairns.
6. On 13 June 2011, Mr Cairns wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Cairns had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

8. On 21 June 2011, the investigating officer notified the Ministers in writing that an application had been received from Mr Cairns, giving them an opportunity to comment on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to explain the steps they had taken to identify and locate the information Mr Cairns had requested.
9. The Ministers responded on 5 July 2011, providing submissions and making reference to previous communications between them and Mr Cairns.
10. The relevant submissions obtained from Mr Cairns and the Ministers will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Cairns and the Ministers and is satisfied that no matter of relevance has been overlooked.



12. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to certain restrictions which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The restrictions contained in section 1(6) are not applicable in this case. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
13. While the Ministers' response to Mr Cairns' request for review was to the effect that his request was not considered valid, the Ministers confirmed in their submissions to the Commissioner that they held no information falling within the scope of the request. No further submissions were received on the question of validity and Commissioner will not consider that point further in this decision.
14. In his application to the Commissioner, Mr Cairns indicated that he did not accept the Ministers' contention that the Scottish Government was not responsible for investigating complaints against the Lord Advocate, where the Lord Advocate was acting directly on behalf of the Government or in certain other circumstances – as opposed to in his or her capacity as head of the systems of criminal prosecution and investigation of deaths. He made reference to the Scottish Government Fraud Policy Statement and to the Scottish Ministerial Code, both of which, he believed, could be relevant to the circumstances he was concerned about. He also considered previous comments by the Ministers on this matter to be inconsistent with this most recent response.
15. While the points raised by Mr Cairns may be relevant in considering whether there should be a reasonable expectation that relevant information should be held by the Ministers, ultimately the question for the Commissioner in this case is whether the Ministers actually held any information falling within the scope of Mr Cairns' request. Given the status of the Lord Advocate, the Ministers asserted that they did not consider the request to be for information they held.
16. Having considered all relevant submissions and the terms and context of Mr Cairns' request, the Commissioner accepts that it was reasonable in all the circumstances for the Ministers to conclude that they did not (and could not reasonably be expected to) hold information which fell within the scope of that request. He is therefore satisfied that the Ministers were correct to give Mr Cairns notice, in terms of section 17(1) of FOISA, that they held no information falling within the scope of his request: this was, in effect, what they did in their letter of 8 June 2011, notwithstanding their reference to the validity of the 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 Cairns.

Appeal

Should either Mr Cairns or the Scottish Ministers wish to appeal against this decision, there is an 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 notice.

Margaret Keyse
Head of Enforcement
12 August 2011



Appendix

Relevant statutory provisions

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.

...