

Decision Notice



Decision 194/2011 Mr G and the Scottish Ministers

Dates of allegations and resulting actions

Reference No: 201101240

Decision Date: 29 September 2011

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Kevin Dunion

Scottish Information Commissioner

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Summary

Mr G requested from the Scottish Ministers (the Ministers) information relating to specified criminal allegations. He received no response to his request. Following a request for review and the intervention of the Commissioner, the Ministers responded to the effect that (to the extent that they considered Mr G to have made valid requests for information) they did not hold the information requested. Mr G was dissatisfied with this response and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mr G's requests for information in accordance with Part 1 of FOISA, by finding only certain of these requests valid and by notifying him that it held no information falling within the scope of these.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is 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. On 18 January 2011, Mr G wrote to the Ministers, requesting certain information on when the First Minister had first become aware of certain criminal allegations, the actions he had taken and intended to take in respect of these allegations and the Lord Advocate's handling of the case, why certain actions had not been taken in respect of the case and when further action on the matter could be expected.
2. On 10 March 2011 Mr G wrote to the Ministers again, requesting a review on the grounds that he had received no response to his request.
3. Mr G received no response to his request for review and on 10 April 2011 wrote to the Commissioner's office, applying to the Commissioner for a decision in respect of that failure. Following an investigation and a decision by the Commissioner, the Ministers notified Mr G of the outcome of their review on 8 July 2011.



4. The Ministers apologised for their earlier failure to respond to Mr G's requests. They also advised him that they did not consider four of his questions (relating to action the First Minister intended to take, why certain actions had not been taken and when further action could be expected) to be requests for recorded information for the purposes of FOISA. In respect of the remaining two questions (which asked when the First Minister had first become aware of the allegations and what actions, if any, he had taken having become aware of them), the Ministers explained that they did not hold the requested information.
5. Mr G wrote to the Commissioner's office again on 10 July 2011, 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.
6. In respect of the two questions the Ministers had dealt with as requests for recorded information, the application was validated by establishing that Mr G had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its responses to those requests.
7. Having considered the remaining questions, the Commissioner accepted the Ministers' conclusion that these were not requests for recorded information and therefore did not fall within the scope of section 1(1) of FOISA. Consequently, the Ministers' handling of these questions will not be considered further in this decision notice: Mr G was advised of this on 12 July 2011.
8. The case was then allocated to an investigating officer.

Investigation

9. On 22 July 2011 the Ministers were notified in writing that an application had been received from Mr G, given an opportunity to provide comments on the application (insofar as it had been accepted as valid, as required by section 49(3)(a) of FOISA) and asked to respond to certain questions. Specifically, the investigating officer sought submissions on the following:
 - a. any steps taken to establish whether information was held which fell within the scope of the relevant requests
 - b. whether the Ministers would be expected to hold that information
 - c. whether any relevant information had been supplied by a third party or was held on behalf of a third party
 - d. whether the information in question had been held previously, and if so whether it had been destroyed or deleted
 - e. whether there was any means by which the information in question could be obtained or collated from other related pieces of information.



10. The Ministers responded to these points on 16 August 2011. Subsequently, the investigating officer sought and obtained clarification in respect of certain aspects of these submissions. The Ministers' submissions, insofar as relevant, will be considered further 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 G and the Ministers and is satisfied that no matter of relevance has been overlooked.
12. In terms of section 1(4) of FOISA, the information to be given to an applicant in response to a request under section 1(1) is (subject to exceptions which do not appear to be relevant in this case) that information held by the authority at the time the request is received. Where a Scottish public authority receives a request for information it does not hold, it must, in line with section 17(1) of FOISA, notify the applicant in writing that it does not hold the information.
13. In responding to those requests the Commissioner has accepted as valid, the Ministers notified Mr G that they did not hold the requested information. The Commissioner must now consider whether this was the appropriate response. His role in this connection is to satisfy himself as to what recorded information falling within the scope of those requests was held by the Ministers at the time they received the requests.
14. Mr G asserted in his application that evidence, in the form of certain correspondence, proved that the First Minister had known about the allegations in question "as far back as 2009". He also provided reasons why the First Minister should have been expected to take action in response to the allegations. While he has taken these submissions into account, the Commissioner must note that it does not necessarily follow from them that the Ministers held information which could provide answers to Mr G's questions. In any event, he must also consider the submissions provided by the Ministers.
15. The Ministers emphasised that Mr G asked when the First Minister had first become aware of the allegations, rather than simply whether he was aware of them (or whether he was aware of them at a particular time). They acknowledged that they held correspondence relating to the matter, from 2007 onwards, involving the First Minister. It could not, however, be established from this information when the First Minister had first become aware of the allegations. Having considered these submissions, along with the correspondence to which Mr G attaches particular relevance, the Commissioner agrees with the Ministers' arguments, both on their interpretation of the request and on the relevance of the correspondence in question.



16. The Ministers also explained that dates and times when a particular Minister became aware of an issue for the first time were not routinely recorded. They explained the searches conducted for the requested information, including the places searched and the search terms used. The Commissioner accepts the searches conducted by the Ministers as adequate and appropriate in the circumstances. He notes that the Ministers identified no relevant information as a result of these searches, and that they are aware of no relevant information ever having been held by them in any capacity or in any form.
17. The Ministers contended that it was not possible to identify any actions taken by the First Minister after becoming aware of the allegations, noting that they could not identify when he had become aware of them. They also explained that they had no locus in the investigation or prosecution of crime, and consequently that any information on this or any other criminal case would routinely be forwarded to the Crown Office and Procurator Fiscal Service (or, as appropriate, the relevant police force) for action. They could not, therefore, be expected to hold information about action taken in response to such allegations, by the First Minister or any other Minister. This would appear to the Commissioner to be a plausible explanation of what is likely to have happened in the circumstances. It does not, however, confirm what, if anything, the First Minister actually did in response to the allegations – and is not, in any event, derived from a record of what he did: having considered all relevant submissions, the Commissioner is satisfied that no such record was held by the Ministers.
18. For the reasons set out above, therefore, the Commissioner is satisfied that that at the time the Ministers received the relevant requests for information they held no information falling within the scope of those requests. Consequently, he is satisfied that they were correct to give Mr G notice to that effect, in terms of section 17(1) of FOISA.

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 G.

Appeal

Should either Mr G 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.

Decision 194/2011
Mr G
and the Scottish Ministers



Margaret Keyse
Head of Enforcement
29 September 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.

...