

Decision Notice



Decision 081/2013 Mr Alistair Sloan and the Scottish Ministers

Correspondence involving Lord Advocate and Solicitor General

Reference No: 201300360
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www.itspublicknowledge.info

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Scottish Information Commissioner

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Summary

On 26 October 2012, Mr Sloan asked the Scottish Ministers (the Ministers) for specific correspondence exchanged between the Lord Advocate/Solicitor General and the First Minister/Deputy First Minister. After some delay, and following the Commissioner's intervention, the Ministers provided Mr Sloan with two documents. Following an investigation, the Commissioner found that the Ministers had failed to respond within the relevant timescales. However, the Commissioner was satisfied that the Ministers held no further relevant information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority)

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 26 October 2012, Mr Sloan wrote to the Crown Office and Procurator Fiscal Service (COPFS) requesting certain information involving the Lord Advocate and the Solicitor General in their ministerial capacity. As COPFS is a department of the Ministers in this context, the Commissioner will refer to the Ministers as the public authority for the remainder of this decision.
2. Mr Sloan sought the content of correspondence relating to Scotland's position in the EU if it were to become independent, which also related to the Commissioner's *Decision 111/2012 Catherine Stihler MEP and the Scottish Ministers*¹. He sought the content of such correspondence between the Lord Advocate (The Rt. Hon. Frank Mulholland QC) and (i) the First Minister and (ii) the Deputy First Minister, and also between the Solicitor General (Ms Lesley Thomson) and either of these Ministers, all from 6 July 2012 until 23 October 2012. He stated that his references to each of these office holders should be read as including their respective offices.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2012/201101968.aspx>



3. The Ministers did not respond to this request and, on 27 November 2012, Mr Sloan wrote to them requesting a review. The Ministers did not respond to Mr Sloan's requirement for review and, on 7 January 2013, he made an application to the Commissioner on the basis that they had failed to respond.
4. On 29 January 2013, the Ministers notified Mr Sloan of the outcome of their review. This response provided Mr Sloan with two pieces of correspondence falling within the scope of his request and did not seek to withhold any information from him.
5. On 30 January 2013, Mr Sloan 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. He withdrew his earlier application.
6. The application was validated by establishing that Mr Sloan made a request for information to a Scottish public authority and 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

7. On 13 February 2013, the investigating officer contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). She asked them to respond to specific questions, relating to their interpretation of Mr Sloan's request and the steps they had taken to identify and locate the information he requested.
8. The relevant submissions received from both the Ministers and Mr Sloan will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

9. Mr Sloan submitted that the Ministers had not responded to his request in full. He believed the request was formatted in such a way that it could be read as four separate requests:
 - a. Request 1: correspondence between the Lord Advocate and the First Minister
 - b. Request 2: correspondence between the Lord Advocate and the Deputy First Minister
 - c. Request 3: correspondence between the Solicitor General and the First Minister
 - d. Request 4: correspondence between the Solicitor General and the Deputy First Minister.



10. Mr Sloan argued that, despite each request being about the same subject matter, each was for correspondence from a specific law officer to or from a specific Minister (and/or their respective offices). Taking this approach, Mr Sloan argued that the Ministers failed to provide appropriate notices under section 17 of FOISA, assuming they held no information falling within the scope of any particular request.
11. Mr Sloan also believed the Ministers held further information falling within the scope of his request(s), which had not been provided. He highlighted that the information disclosed to him suggested that discussions between these parties had taken place previously: given the importance of the issues, he did not believe such discussion would have been solely verbal and unrecorded. He also argued that it would be reasonable to expect the high-profile nature of *Decision 111/2012* to result in a great deal more correspondence.
12. In response to Mr Sloan's concerns, the Ministers stated that responding to his "requests" separately would not change the information available to release. They submitted that the information released to him was all the information that was held by the relevant areas of the Scottish Government and by the offices of the Lord Advocate and Solicitor General.
13. The Ministers acknowledged, however, that it would have been helpful to assure Mr Sloan that each part of his request had been considered and that the information provided was all the relevant information they held.
14. The Ministers provided a detailed description of the searches undertaken to identify information falling within the scope of Mr Sloan's request. They stated that searches were conducted by the personal assistant to the Lord Advocate, which identified the two pieces of correspondence released to Mr Sloan. This individual also liaised with the Solicitor General's office, which is in the same building.
15. The offices of the Deputy First Minister and the First Minister conducted searches of their email and correspondence logs, and no information was identified as falling within the scope of the request.
16. The Ministers explained that the Ministers' Private Offices did not use the Scottish Government's electronic Records Management System (eRDM) and only held correspondence for three months (due to the volume of correspondence passing through these offices). Information considered to be for the public record would be passed to the relevant policy area for storage in the eRDM system.
17. Correspondence sent from or to the Ministerial Private Offices and the Lord Advocate/Solicitor General's Office was, the Ministers explained, held on the SCOTS email system (including archived email). A search of this system was undertaken using the following terms:
 - a. EU/EU Membership
 - b. independence
 - c. correspondence received from DFM/DFM's Private Office
 - d. correspondence received from FM/FM's Private Office



- e. correspondence issued to DFM/DFM's Private Office
 - f. correspondence issued from FM/FM's Private Office.
18. A search of the Crown system was not undertaken, the Ministers explained, as this was used only for criminal work and work relating to the Law Officers' prosecutorial role.
19. The Ministers also explained that searches of the eRDM system for relevant information did not locate any relevant correspondence falling within the timescales of the request. Keywords used were:
- a. EU/EU Membership
 - b. independence
 - c. Deputy First Minister/DFM
 - d. First Minister/FM
 - e. Lord Advocate
 - f. Solicitor General
 - g. combinations of the above terms.
20. The Ministers submitted that the dates and the terms of Mr Sloan's request were very specific, and therefore limited information was held which fell within the time period specified by the request. They also suggested that the Ministers' Private Offices and the Lord Advocate's office were aware of any correspondence undertaken with regard to the topics identified by Mr Sloan, which added to their confidence that all relevant information had been identified.
21. The Commissioner is satisfied that the Ministers conducted adequate and proportionate searches to identify all the information held by them and falling within the scope of Mr Sloan's request. She has taken full account Mr Sloan's submissions, but would consider it would be an artificial exercise to split the request of 26 October 2012 into four separate requests. The request relates to a single subject over a single period. It is perfectly feasible to deal with all of the potential lines of correspondence falling within the scope of that request while still treating it as one request. In the circumstances, she is satisfied that the Ministers did this, and fails to see what difference it could have made (apart from creating unnecessary complexity) dealing with the request as four rather than one.
22. The Commissioner agrees with the Ministers, however, that it would have been helpful to confirm to Mr Sloan that his request had been considered in full and that they held no further information falling within its scope.

Technical requirements of FOISA

23. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following receipt of the request to comply with a request for information, subject to qualifications which are not relevant here.



24. As the Ministers did not provide a response to Mr Sloan within 20 working days, the Commissioner finds that the Ministers failed to comply with section 10(1) of FOISA.
25. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following receipt of the requirement to comply with a requirement for review, again subject to qualifications which are not relevant here.
26. As the Ministers did not provide a response to Mr Sloan within 20 working days, the Commissioner finds that the Ministers failed to comply with section 21(1) of FOISA.
27. By way of explanation, the Ministers stated that Mr Sloan originally sent his request to COPFS and this was then passed to the Scottish Government to take forward. It was not immediately identified who would be best placed to provide a response and then it was overlooked due to the volume of work being undertaken in that area. Following receipt of the requirement for review, searches were undertaken, but due to a combination of public holidays and seeking clearances, a further delay was incurred.
28. The Ministers acknowledged the significant time delay in this case and confirmed that they had apologised to Mr Sloan for this. They explained that they had sought to highlight with officials the importance of ensuring that information requests are passed on timeously (where appropriate) to the correct work area. The Ministers also believed it was unfortunate that the request fell to be dealt with during the Christmas period, which unduly affected the time available to undertake the searches and seek the necessary clearances for release.
29. The Commissioner notes these explanations, although she would observe that the request need not have been dealt with over the Christmas period – and that, in any event, public authorities are still required (subject to provision in respect of bank holidays) to respond to information requests over that period.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Sloan. She is satisfied that the Ministers held no further information falling within the scope of Mr Sloan's request.

In failing to respond to Mr Sloan's request and requirement for review within the respective timescales laid down in sections 10(1) and 21(1) of FOISA, the Ministers failed to comply with Part 1.

The Commissioner does not require the Ministers to take any action in respect of these failures in response to Mr Sloan's application.



Appeal

Should either Mr Sloan 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.

Margaret Keyse
Head of Enforcement
7 May 2013

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.
...
- (6) This section is subject to sections 2, 9, 12 and 14.



10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...