

# Decision Notice

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## Decision 182/2014 Mr Andrew Picken and the Scottish Ministers

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### **Expenditure on travel and subsistence cards**

Reference No: 201302248

Decision Date: 20 August 2014



Scottish Information  
Commissioner



## Summary

On 13 April 2013, Mr Andrew Picken asked the Scottish Ministers (the Ministers) for expenditure on travel and subsistence cards by Scottish Government ministers, excluding the First Minister, since 2007. The Ministers did not respond to this request. Following a review, the Ministers disclosed some information but withheld the names of the accommodation in which Ministers had stayed. Mr Picken remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers disclosed more information, the Commissioner required the Ministers to disclose the withheld information (the names of hotels) to Mr Picken.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(1) (Health, safety and the environment)

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

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1. On 13 April 2013, Mr Picken asked the Ministers for:  
“A copy of all original bills or reports which show expenditure incurred on Scottish Government Travel & Subsistence Cards by all Scottish Government ministers, excluding the First Minister, since 2007. For the avoidance of doubt this should be either when a minister has personally used the cards or a civil servant has done so on his or her behalf.”
2. Mr Picken did not receive a response to his request so, on 28 May 2013, requested a review on the basis that the Ministers had failed to respond. The Ministers did not respond to the request for review and, on 13 July 2013, Mr Picken applied to the Commissioner for a decision. The Ministers’ failure to respond to the request and requirement for review was dealt with in *Decision 170/2013 Mr Andrew Picken and the Scottish Ministers*<sup>1</sup>.
3. The Ministers responded to Mr Picken's requirement for review on 23 September 2013. They disclosed information from reports on travel and subsistence card expenditure, but withheld the names of hotel accommodation under section 39(1) of FOISA.
4. On 28 September 2013, Mr Picken emailed 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.
5. The application was validated by establishing that Mr Picken 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.

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<sup>1</sup> <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201301612.aspx>  
Print date: ~~28/08/2014~~20/08/2014

## Investigation

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6. On 7 October 2013, the Ministers were notified in writing that an application had been received from Mr Picken and were asked to provide the Commissioner with the information withheld from him. The Ministers provided the information requested and the case was then allocated to an investigating officer.
7. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
8. The Ministers responded by providing submissions as to why they considered the information was exempt from disclosure in terms of section 39(1) of FOISA.
9. On 23 January 2014, the Ministers were asked what information was published about future ministerial engagements. This was provided on 31 January 2014.
10. Additional submissions were requested and provided by the Ministers during the course of the investigation.
11. On 14 July and 6 August 2014 the Ministers disclosed the names of the international hotels that the Ministers had stayed in, to Mr Picken. Only the names of domestic hotels remained withheld.

## Commissioner's analysis and findings

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

### Section 39(1) of FOISA – Health, safety and the environment

13. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test required by section 2(1)(b) of FOISA.
14. The Commissioner's briefing<sup>2</sup> on this exemption notes that section 39(1) does not contain the "substantial prejudice" test found in various other exemptions contained in Part 2 of FOISA. Instead, this exemption refers to the "endangerment" of health or safety.
15. The Commissioner's view is that the term "endanger" is sufficiently broad to apply where there is a direct or indirect threat to the safety of a person which would foreseeably arise in the future as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner considers that for endangerment to be considered likely there must, however, be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
16. In order for the exemption to apply, the public authority must be able to explain or show why disclosure of the information would be at least likely to cause such endangerment. There must be an evident connection between the two events (disclosure and endangerment).

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

17. In reaching a conclusion on the matter, the Commissioner must base her decision on the facts and information presented to her. The onus lies with the public authority to provide evidence, facts and arguments to support its conclusions.

#### *The Ministers' submissions*

18. The Ministers submitted that they often use the same hotels when travelling; consequently, disclosure of the names of the hotels they had stayed in could impact on the safety of the Scottish Cabinet or other Ministers and on the Scottish Government's ability to organise and ensure their safety, the safety of employees at certain venues, and the safety of the communities in which those venues are located. The Ministers considered that disclosure of the withheld information could allow patterns of movement to be identified in some cases, where certain hotels are regularly visited: in cases where it might be publicly known that a Minister would be visiting a certain town or city on a particular date, the Ministers believed it would be possible to anticipate the hotel in which the Minister would be likely to stay.
19. The Ministers noted that some locations have few options for accommodation, and argued that it would be possible for individuals to link information already released about expenditure on Ministerial engagements and create their own data on previously used Ministerial accommodation.
20. The Ministers commented that while there were a few cases where the first part of the hotel's postcode had been disclosed, this had only taken place where there were a significant number of hotels in that postcode area, so people would not be able to easily establish the name of the hotel from the partial postcode information.
21. The Ministers acknowledged that information about the hotels in which they have stayed has sometimes been released into the public domain after the Ministerial visit has taken place. They also acknowledged that, in the era of social media, 'citizen journalists' may record and publish information on the location of well-known celebrities, public figures and politicians. However, they argued that the review of security arrangements in the run up to the Independence Referendum means that the Ministers have reconsidered their position on the disclosure of data which identifies patterns of accommodation, and are now endeavouring to act consistently across all data sets to mitigate risk. The Ministers considered that they needed to be consistent in their approach to security for Ministers and, therefore, regardless of the numbers of hotels in a location, they should not release hotel names and thereby increase the risk of an attack on Ministers with its consequences for public safety.
22. The Ministers stated that details of Ministerial engagements, and dates and expenditure on overseas Ministerial travel are published. In both cases, the Ministers recognised that there is a public interest in making such information available, and recognised that, in practice, it would create significant difficulties in conducting Government business effectively if details about the cities Ministers visit were not to be revealed (e.g. where a Minister is appearing at a public conference, the location usually needs to be publicly available). However, the Ministers considered that, in terms of policy, there was no need to release details of hotels in which Ministers stayed as while they were in the hotel the Ministers would not be conducting public business that members of the public might wish to attend.
23. The Ministers commented that accommodation costs had already been disclosed to Mr Picken in response to his request.
24. The Ministers stated that, after a review of Ministerial Security last year, Police Scotland advised that withholding the information would reduce risks to both personal and community safety. The Ministers noted that the heightened political situation in Scotland has seen the

development of a very detailed interest in Ministers' activities. They argued that releasing information about a Minister's likely whereabouts, in advance, carries a heightened risk of potential disturbances, direct provocation, injury or contact potentially requiring police attendance or intervention. The Ministers considered that withholding the information reduced the likelihood of this and contributed greatly to continued security.

25. Although the Ministers stated that in the run-up to the Independence Referendum there had been considerably more attention paid to Ministers, making it more likely that they would encounter threats from those who hold extreme views or who feel moved to act against them, the Ministers did not provide any actual examples of how the harm to the individuals concerned might manifest itself, or refer to any threats received. They acknowledged that, currently, there was no known serious specific threat, but stated that this did not mean that the risk should not be taken seriously.
26. During the investigation, the Ministers confirmed that they do not publish a schedule of Ministerial engagements in advance due to the security risk that this would pose, and also due to the fact that diaries are fluid and there is often a requirement for short notice changes and cancellations. However, they stated that information about Ministers' public engagements in any given week is widely available in advance, for example:
  - The Ministerial Code (section 9.20 to 9.22)<sup>3</sup> sets out which elected representatives should be informed in advance of Ministerial visits. The Scottish Government also informs the Chief Executive of the relevant local authority of any planned visits in their area, usually 48 hours or more in advance.
  - Stakeholders will publicise events involving Ministers through their networks and/or local or national press.
  - Those attending events where Ministers are to be present will have this information ahead of the visit, and will frequently publicise the event or the anticipated Ministerial involvement through social media or on websites.
  - Stakeholders or Scottish Government may also publicise events through regular formal press releases on the Scottish Government website.

#### *Commissioner's conclusions*

27. The Commissioner considered the Ministers' submissions in detail. She accepts that where security considerations and potential security risks are concerned, it is appropriate to take a cautious approach. It is in this context she gave careful consideration to the Ministers' arguments that disclosure of the information about hotels used on previous occasions could put individuals at greater risk of harm in future, or make it more difficult or more expensive to protect them from any threat to their security.
28. The Ministers' arguments are based on their assertion that disclosing the names of the hotels would endanger Ministers, as someone could use the information, with other published information such as advance information of Ministerial visits or information on social media sites, to work out a pattern of where they stay, and so be able to predict where Ministers are likely to stay on a given occasion. This information, i.e. where they are likely to stay, could, it is asserted, endanger Ministers because disclosure has the potential to increase the risk of an attack on the Ministers. Increased attacks on Ministers could, in turn they claim, endanger community safety and staff. For the exemption in section 39(1) to apply, the

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<sup>3</sup> <http://www.scotland.gov.uk/Resource/Doc/364058/0123666.pdf>

Ministers are required to show why disclosure of the information would, or would be likely to, endanger any person's safety. The Ministers must show why they consider there would be an increased risk sufficiently great to cause such endangerment. As is set out in the Commissioner's briefing although the exemption does not specify that any threat should be imminent, there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility, in order for endangerment to be considered likely.

29. Although Ministers have made a strong argument about it being possible for locations to be predicted, they have not provided any evidence to show why there is any likelihood beyond an unsupported claim, that this will increase risk of endangerment by potentially leading to attacks on Ministers. For example, they did not cite any examples, give details of specific or similar incidents or provide any police or security reports or opinions beyond a general statement from them that withholding information would reduce risk. It is not clear to the Commissioner how withholding the information would reduce risk, as the Ministers' arguments are predicated on their belief that disclosure would increase risk, suggesting that withholding it would mean the risk would remain the same. No further information about risk was provided by the Ministers.
30. The Commissioner finds that the Ministers have not demonstrated that their arguments about increased risk of endangerment should locations of hotels be disclosed are based on more than hypothetical supposition; she is not persuaded by these unsupported arguments that disclosure of the information would result in the harm identified by the Ministers. She, therefore, finds that the exemption in section 39(1) of FOISA does not apply to the withheld information.
31. Having concluded that the exemption was wrongly applied, the Commissioner is not required to consider the public interest test in relation to disclosing or withholding this information. She requires the Ministers to disclose the information to Mr Picken.

## Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Andrew Picken, by wrongly withholding the information under section 39(1) of FOISA.

The Commissioner therefore requires the Ministers to disclose the withheld information, by Monday 6 October 2014.



## **Appeal**

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Should either Mr Andrew Picken 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.

## **Enforcement**

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If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Ministers have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

**Rosemary Agnew**  
**Scottish Information Commissioner**  
**20 August 2014**



## Appendix

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### 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.

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

#### 2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

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#### 39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

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