

Decision Notice

Decision 204/2014 Mr Andrew Picken and the Scottish Ministers

Expenditure on travel and subsistence cards – First Minister

Reference No: 201302619

Decision Date: 22 September 2014



Scottish Information
Commissioner

Summary

On 18 July 2013, Mr Picken (of the Sunday Post) asked the Scottish Ministers (the Ministers) for details of expenditure on travel and subsistence cards by the First Minister, or on his behalf, since 2007. The Ministers did not respond to this request, or to his subsequent request for review. Following an application to the Commissioner, the Ministers responded to his review, disclosing some information. They withheld the names of the accommodation in which the First Minister had stayed. Mr Picken remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had been entitled to withhold the names of the UK hotels the First Minister had stayed in, for reasons of safety under section 39(1) of FOISA. However, she found that, by failing to disclose the names of international hotels he had stayed in until during the investigation, the Ministers failed to comply with Part 1 of FOISA.

The Commissioner also had significant concerns about the Ministers' handling of the case.

Relevant statutory provisions

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); 50(1)(a) (Information notices)

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 and Investigation

1. The following table summarises the main points of Mr Picken's request for information and requirement for review made to the Ministers, their handling by the Ministers and the Commissioner's subsequent investigation:

Date	Details
	Request and review
18 July 2013	Request for information Mr Picken wrote to the Ministers requesting the following information: "A copy of all original bills or reports which show expenditure incurred on Scottish Government Travel & Subsistence Cards by Alex Salmond since 2007. For avoidance of doubt this should be either when the First Minister has personally used the cards or a civil servant has done so on his behalf."
31 August 2013	Requirement for review Mr Picken asked for a review, on the basis that the Ministers had failed to respond to his request.

Date	Details
5 October 2013	<p>First application to the Commissioner</p> <p>Mr Picken applied to the Commissioner for a decision, the Ministers having failed to respond to his requirement for review. These failures are addressed in <i>Decision 243/2013 Mr Andrew Picken and the Scottish Ministers</i>¹.</p>
25 October 2013	<p>Ministers' response to Mr Picken</p> <p>The Ministers provided Mr Picken with a list of the expenditure on the Travel and Subsistence Card held by the First Minister's Office. They explained that the First Minister did not use such a card personally, and stated that details of accommodation used by the First Minister had been redacted on the basis that section 39(1) of FOISA applied.</p>
2 November 2013	<p>Further application to the Commissioner</p> <p>Mr Picken wrote to the Commissioner's office, 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.</p> <p>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.</p>
Commissioner's investigation	
11 November 2013	<p>Ministers asked to provide withheld information</p> <p>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 and the case was then allocated to an investigating officer.</p>
15 January 2014	<p>Confirming withheld information</p> <p>After reviewing the withheld information, the investigating officer asked Ministers to confirm that they had identified all of the information that fell within the scope of this request.</p>
24 January 2014	<p>Comments received from the Ministers</p> <p>The Ministers responded, identifying one additional item of expenditure covered by the request. Mr Picken was provided with this, along with related information which the Ministers submitted they did not hold when they received the request.</p>
6 February 2014	<p>Formal submissions sought from Ministers</p> <p>The investigating officer wrote to 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. These related to potential gaps in the information provided, and to the Ministers' reliance on section 39(1) of FOISA.</p>

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2013/201302329.aspx>

Date	Details
28 February 2014	<p>The Ministers' submissions</p> <p>These addressed some, but not all, of the points raised in the investigating officer's letter of 6 February.</p>
5 March 2014	<p>Request for further submissions</p> <p>The investigating officer wrote to the Ministers again, seeking a response to the outstanding queries.</p>
17 March 2014	<p>Further submissions from the Ministers</p> <p>The Ministers responded, providing submissions on the outstanding queries.</p>
25 March and 15 April 2014	<p>Clarification sought from the Ministers</p> <p>This followed further consideration of the submissions received.</p>
8 April and 8 May 2014	<p>Further submissions from the Ministers</p> <p>In response to the 25 March and 15 April requests for clarification.</p>
28 May 2014	<p>Information Notice issued</p> <p>After detailed and careful consideration of the Ministers' submissions, the Commissioner issued an Information Notice to the Ministers under section 50(1)(a) of FOISA. This sought further evidence in relation to the information held, with particular reference to potential gaps in the information.</p>
30 June 2014	<p>Meeting with the Ministers and Police Scotland</p> <p>The Commissioner met representatives of the Ministers and Police Scotland, and received further evidence in support of the Ministers' reliance on section 39(1) of FOISA.</p>
14 July 2014	<p>Response to Information Notice and disclosure</p> <p>The Ministers responded to the Commissioner's Information Notice while simultaneously disclosing the names of the international hotels the First Minister had stayed in. Only the names of the domestic hotels remained withheld.</p>

Commissioner's analysis and findings

- 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 has also taken account of supplementary evidence provided by Police Scotland. She is satisfied that no matter of relevance has been overlooked.

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

- The Ministers applied this exemption to the names of hotels in the United Kingdom used by the First Minister.
- 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 in section 2(1)(b) of FOISA.

5. The Commissioner's briefing² 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.
6. 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 be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
7. 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).

The Ministers' submissions

8. The Ministers referred to the submissions in the case of *Decision 182/2014 Mr Andrew Picken and the Scottish Ministers*. These submissions were made in relation to the names of hotels used by Ministers on official business.
9. The Ministers submitted that they often used the same hotels when travelling; consequently, disclosure of the names of the hotels they 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 particular venues, and the safety of the communities in which those venues were located. The Ministers considered disclosure of the withheld information could allow patterns of movement to be identified in some cases, where certain hotels were visited regularly: in cases where it might be publicly known that a Minister would be visiting a particular town or city on a particular date, the Ministers believed it would be possible to anticipate the hotel in which the First Minister would be likely to stay.
10. The Ministers noted that some locations had 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.
11. The Ministers acknowledged that information about the hotels in which they had stayed was sometimes released into the public domain after the Ministerial visit had taken place. They also acknowledged that, in the era of social media, "citizen journalists" might record and publish information on the location of well-known celebrities, public figures and politicians. They also acknowledged that information had been disclosed to requesters in similar cases, but contended that the political environment had changed significantly.
12. The Ministers noted that security arrangements had been reviewed in the run-up to the Independence Referendum, with the result that they had reconsidered their position on the disclosure of data identifying patterns of accommodation and were now endeavouring to act consistently across all data sets to mitigate risk. They believed they needed to be consistent in their approach to security for Ministers and, therefore, regardless of the numbers of hotels

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

in a location, they should not release hotel names and thereby increase the risks to Ministers and their staff, and consequences for public safety.

13. The Ministers stated that details of Ministerial engagements, and dates of and expenditure on overseas Ministerial travel, were published. In both cases, the Ministers recognised a public interest in making such information available, and accepted that, in practice, it would create significant difficulties for conducting Government business effectively if details of the cities visited by Ministers 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, in terms of policy, the Ministers did not believe there was a need to release details of hotels stayed in: while they were in the hotel, the Minister would not be conducting public business members of the public might wish to attend.
14. The Ministers referred to Police Scotland advice received in the context of the review of Ministerial Security referred to above. The Ministers noted that the heightened political situation in Scotland had seen the development of a very detailed interest in Ministers' activities. They argued that releasing information about a Minister's (and particularly the First Minister's) likely whereabouts, in advance, carried heightened risk for the Ministers which needed to be managed.
15. The Ministers considered withholding the information reduced the likelihood of risk and contributed greatly to continued security, arguing that this was consistent with the advice received from Police Scotland. The Commissioner also received, in confidence, further submissions from the Ministers and the Police on security issues specific to the First Minister.

Commissioner's conclusions on the application of the exemption

16. The Commissioner accepts that where security considerations and potential security risks are concerned, it is appropriate to take a cautious approach.
17. The Ministers' arguments are based on their assertion that disclosing the names of the domestic hotels the First Minister had stayed in would endanger the First Minister, 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 he stays, and so be able to predict where he is likely to stay on a given occasion. This information (i.e. where they are likely to stay) could, it is claimed, endanger the First Minister because disclosure has the potential to increase the risks relating to his security, which in turn, (the Ministers claim) might endanger community public safety and that of staff.
18. For the exemption in section 39(1) to apply, the 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 the Commissioner's briefing states, although the threat need not be imminent, there must be some well-founded apprehension of danger: the prospect of harm must be a distinct possibility for endangerment to be considered likely.
19. Given that the threat must be real and not hypothetical, the Ministers were asked to provide evidence to support their position.
20. In communications with the Ministers and at the meeting on 30 June 2014, the Commissioner received evidence to support the position taken by the Ministers with regard to their reliance on section 39(1) of FOISA to withhold domestic hotel names. This evidence

was specific to the First Minister's position. For obvious reasons the Commissioner is unable to describe this evidence in any detail here.

21. The Commissioner has considered the submissions and supporting evidence she has received carefully. In all the circumstances of this case, she is satisfied that she has been provided with sufficient evidence to support the application of section 39(1) of FOISA in relation to the First Minister.
22. As she is satisfied that section 39(1) applies to the names of the domestic hotels, the Commissioner must now apply the public interest test in section 2(1)(b) of FOISA and consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by that in maintaining the exemption.

The public interest test

23. As stated above, details of the First Minister's engagements are already published. The dates of, and expenditure on, overseas travel are also published. In both cases, the Ministers acknowledged the public interest in disclosure, but argued that this did not extend to details of the accommodation used.
24. The Ministers acknowledged that there was a public interest in ensuring that the accommodation stayed in by the First Minister offered best value to the public purse, and an interest in why certain venues might have been chosen. The Ministers considered the first interest had been satisfied in the information on accommodation costs disclosed already, along with details of other expenditure such as restaurant meals. With regard to publishing the names of the hotels used by the First Minister, they argued that there was a strong public interest in securing the safety of the First Minister and mitigating the risk to him, his team and others associated with his hotel stays.
25. The Commissioner accepts that the public interest has, to some extent, been satisfied by the disclosure of expenditure incurred and the disclosure of international hotel names. As stated above, she accepts that the Ministers have provided sufficient evidence to allow her to conclude that disclosure of the withheld names would, or would be likely to, endanger the physical safety of an individual or individuals. The Commissioner did not reach this conclusion lightly and, with this in mind, she concludes that the balance of the public interest on this occasion favours the exemption being maintained.
26. The Commissioner therefore concludes that the Ministers were entitled to withhold this information on the basis that section 39(1) of FOISA applied.

Handling of request

27. Although the Commissioner has concluded that the Ministers were correct in their application of section 39(1) of FOISA (in relation to domestic hotels), she feels compelled to comment on the Ministers' handling of this request, both directly in response to Mr Picken and in communications with her office.
28. Initially, the Commissioner was required to carry out an investigation on the basis that the Ministers simply failed to respond to or even acknowledge Mr Picken's request for information. It was only after the Commissioner had received an application from Mr Picken that the Ministers provide him with any form of response. No explanations or apologies were provided to Mr Picken for this failure.
29. The Commissioner would also highlight that it took from 2 November 2013 (receipt by her of Mr Picken's further application) to 15 July 2014 to establish the true extent of the information held by the Ministers, which of that information had been withheld from Mr Picken and to

obtain adequate submissions from the Minister to support their application of section 39(1) of FOISA (and then only following the issue of an Information Notice under section 50(1)(a) of FOISA).

30. All Scottish public authorities should have in place robust arrangements which enable them to identify and locate information they hold, when that information is requested by any person. A failure to do so, despite numerous interventions by Mr Picken and the Commissioner over a considerable period, must call into question whether the Ministers can be said to have such arrangements in place, at least in relation to the information covered by this request.
31. The Ministers' handling of this request cannot be considered to reflect what the Commissioner would regard as good (or even remotely acceptable) practice in responding to an information request. This is all the more unacceptable given there is a reasonable expectation that information of this type (expensed incurred by the First Minister in the course of his official duties) would be requested and scrutinised.
32. The Commissioner must also note that the names of international hotels (and a small amount of additional information) were not disclosed to Mr Picken until during the investigation. While the issues presented by such information may be complex, this does not excuse failure to provide the information to Mr Picken (in the absence of valid grounds for refusing to do so under the legislation) within the relevant timescales allowed in Part 1 of FOISA. In this case, the Commissioner must find that the Ministers' failure to do so was a breach of section 1(1) of FOISA.
33. The Commissioner has considered all of the Ministers' submissions in relation to the information they held and which fell within the scope of Mr Picken's request, together with the information they identified and located. With the exception of the information she has found to be properly withheld under section 39(1) of FOISA, the Commissioner is satisfied that all relevant information held by the Ministers has now been provided to Mr Picken.

Decision

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in withholding the names of hotels in the United Kingdom under section 39(1) of FOISA. To the extent that they failed to provide Mr Picken with other information until during her investigation, she must find that the Ministers failed to comply with section 1(1) of FOISA.

As she is satisfied that the Ministers complied fully with Mr Picken's request by the close of her investigation, the Commissioner does not require the Ministers to take any further action in this case, in response to Mr Picken's application.

Appeal

Should either Mr 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.

Rosemary Agnew
Scottish Information Commissioner
22 September 2014

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.

...

- (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.

...

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.

...

50 Information notices

- (1) Where the Commissioner –

- (a) has received an application under section 47(1); ...

that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as is specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act ... as is so specified.

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