

Decision Notice

Decision 043/2015: Mr Alan Mr McNeillage and the Scottish Ministers

Compilation of the white paper “Scotland’s Future”

Reference No: 201402785

Decision Date: 30 March 2015



Scottish Information
Commissioner

Summary

On 2 April 2014, Mr McNeillage asked the Scottish Ministers (the Ministers) for information concerning the compilation of the white paper “Scotland’s Future” (the WP).

The Ministers responded with some information, explaining why they did not hold other information Mr McNeillage had asked for. Following a review, Mr McNeillage remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the Commissioner considered whether the Ministers had interpreted Mr McNeillage’s request reasonably, particularly in relation to the role of external consultants. She concluded that the work of external consultants should be deemed to fall within the scope of the request, and required the Ministers to disclose information on the relative costs. She also concluded that the Ministers should have given Mr McNeillage further advice and assistance in explaining the role of special advisers.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 2 April 2014, Mr McNeillage made a request for information to the Ministers. The information requested related to the WP. He asked:
 - a) Which category of individual compiled the WP – was it civil servants, SNP employees and/or external consultants?
 - b) What was the time spent by each category of individual?
 - c) What was the cost of the time spent by each category of individual?
2. The Ministers responded on 1 May 2014, explaining that civil servants across the Scottish Government prepared the WP, but without working on it full time. They went on to explain that the time spent on this work was not routinely recorded.
3. On 13 May 2014, Mr McNeillage wrote to the Ministers requesting a review of their decision. He believed the time and cost would have been recorded. In addition, he did not consider the Ministers had answered his request in relation to SNP staff and external consultants.
4. The Ministers notified Mr McNeillage of the outcome of their review on 4 July 2014. They confirmed the original response, stating in addition that no SNP staff or external consultants were involved in drafting the WP.
5. On 4 December 2014, Mr McNeillage wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr McNeillage thought the Ministers would hold more information on the work involved in preparing the content of the

WP, given the scale of the project. In addition, he did not accept that only civil servants worked on the WP, submitting that special advisers must also have been involved.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr McNeillage made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision. The case was then allocated to an investigating officer.
7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 13 January 2015, the investigating officer notified the Ministers in writing that Mr McNeillage had made a valid application and invited them to comment on this application. They were asked to explain the searches carried out and the respective roles of each category of person specified by Mr McNeillage in preparing the content of the WP.
8. During the investigation, further comments were obtained from the Ministers on the involvement of external consultants.

Commissioner's analysis and findings

9. 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 McNeillage and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Information held by the Ministers

10. 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. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow authorities to withhold information or charge a fee for it. These qualifications do not apply in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold, although the applicant's submissions on this point may be relevant to the investigation. If no information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
12. The Ministers disclosed information in their initial response, but Mr McNeillage expected more information to be held. In their review outcome, the Ministers confirmed that they had disclosed all the relevant information they held, explaining that no SNP staff or external consultants were employed in drafting the WP.
13. During the investigation, the Ministers clarified that special advisers were temporary civil servants and not SNP consultants or employees. With regard to the time of civil servants generally, and the cost of that time, the Ministers confirmed that this was not information they recorded, either routinely or in relation to this particular project. They had no business need to do so.
14. The Ministers explained that while a small team of staff had a co-ordinating role for the work in question, this had been part of a wider programme of work on constitutional reform. In

addition, a number of other civil servants had been involved in the project, as part of their normal day-to-day duties.

15. From Mr McNeilage's submissions, the Commissioner considers it reasonable to conclude that his references to the WP being "compiled" were intended to refer to preparation of the WP's content. In her view, this would have been an appropriate basis for the Ministers to approach the request.
16. From the explanations provided by the Ministers, the Commissioner is satisfied that:
 - (i) special advisers are temporary civil servants;
 - (ii) in relation to the work carried out by civil servants (including special advisers), the Ministers are not capable of answering parts b) and c) of Mr McNeilage's request;
 - (iii) SNP staff were not involved in the WP's preparation.
17. In relation to external consultants, the Ministers further explained that there were four sources of external expertise contracted to investigate issues in connection with independence, prior to the drafting of the WP. None of these, in the Ministers' view, were contracted to help prepare or draft the WP. Their work might have been used by civil servants to inform the drafting, but none of the material in the WP was prepared by consultants.
18. The Ministers noted that two consultancies were engaged through the Defence and Security workstream and two through the Welfare workstream. They were contracted to advise policy teams in considering the Scottish Government's policy position and preparedness in those areas, in the event of independence. The Ministers contended that these experts were not contracted to prepare the white paper, and did not feed into the drafting of the white paper or its compilation. Therefore, they did not consider the work of these consultants to fall within the scope of Mr McNeilage's request.
19. The Commissioner has considered the terms of Mr McNeilage's request. As indicated in paragraph 15, she considers it reasonable to interpret the word "compiled" as referring to preparation of the content of the report. Broadly, that appears to have been the approach taken by the Ministers, but the Commissioner still considers the request to have been interpreted too narrowly.
20. Mr McNeilage does not appear to belong to any category of person which could be expected to express themselves with particular precision in framing a request. Generally, the Commissioner would expect a Scottish public authority to interpret a request for information broadly, attempting to put themselves in the place of an ordinary person making the request. Fine distinctions, based on specialist knowledge, will not necessarily be conducive to an effective response.
21. In this case, the Commissioner considers it would have been appropriate to interpret the request to include the work of the external consultants, assuming there was a reasonably direct link between their work and the production of the WP. If that work informed the drafting of the WP, she would consider it a wholly artificial exercise to attempt to draw the distinction the Ministers are making. She does not consider it reasonable to expect anyone to believe that it did not inform that product. This was work in policy areas where the Ministers have acknowledged they did not have adequate internal expertise: that was why the consultants were commissioned and, once they were commissioned, it would have been wholly irrational for their advice not to have a substantial influence on the drafting of the relevant sections of the WP.

22. In all the circumstances, therefore, the Commissioner would consider it quite alien to the understanding of the ordinary citizen to attempt to separate the strand of policy development informed by the consultants from the production of the WP. Consequently, in her view, the Ministers should have interpreted Mr McNeilage's request to include the contributions of these consultants. This should have figured in their response to part a) of the request.
23. The Commissioner notes that the Ministers hold costs for the four sources of external expertise. She is prepared to accept that they do not hold records of the time spent by the consultants on this work. These costs, however (as a total), would have addressed part c) of the request in relation to the consultancy work. At no point in the investigation have the Ministers suggested that this figure should be exempt from disclosure.
24. In failing to address Mr McNeilage's request fully, the Ministers failed to respond to the request in accordance with section 1(1) of FOISA. The Commissioner requires the Ministers to address this element of Mr McNeilage's request, by confirming that external consultants were involved in the preparation of the WP and disclosing the total cost of their involvement.

Section 15 – duty to provide advice and assistance

25. As indicated above, the Commissioner accepts that special advisers are temporary civil servants. She is well aware of this, as (of course) are the Ministers. It may be less evident to the ordinary citizen, however.
26. In their submissions to the Commissioner, the Ministers acknowledged that "Mr McNeilage's application for an appeal appears to be based on a misunderstanding of the status of special advisers". They were responding to Mr McNeilage's statement, in his application to the Commissioner, that "special advisers are not civil servants".
27. It is unfortunate that this was not anticipated. The Commissioner believes it could have been. She believes it to be a common misapprehension that special advisers are not civil servants, and that Mr McNeilage's understanding of the Ministers' response would have been aided considerably by being informed that they are civil servants.
28. The Commissioner considers it would have been reasonable, in the circumstances, to expect the Ministers to advise and assist Mr McNeilage by explaining that special advisers are temporary civil servants. In failing to do so, she finds that the Ministers failed to comply with their duty under section 15(1) of FOISA. The point is fully explained here, so the Commissioner does not require the Ministers to take any action in response.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr McNeilage.

The Commissioner finds that by disclosing information to Mr McNeilage, the Ministers complied with Part 1.

However, the Commissioner finds that the Ministers failed to comply with

- (i) section 1(1) of FOISA, by failing to identify and disclose the costs of external consultants;
- (ii) section 15(1) of FOISA, by failing to explain that special advisers are temporary civil servants.

The Commissioner requires the Ministers to confirm the involvement of external consultants and disclose the cost of that external expertise to Mr McNeilage, by 15 May 2015.

Appeal

Should either Mr McNeilage 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

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.

Margaret Keyse
Head of Enforcement

30 March 2015

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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

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