

Decision Notice

Decision 036/2017: Mr Severin Carrell and the Scottish Ministers

Consultation on a written constitution for an independent Scotland

Reference No: 201602188

Decision Date: 14 March 2017



Scottish Information
Commissioner

Summary

The Ministers were asked for information about the Scottish Government's consultation on an interim constitution for Scotland, carried out in 2014. The Ministers stated that they did not hold some of the information. The Commissioner upheld the Ministers' response.

The Commissioner also found that the Ministers failed to respond to the request and requirement for review within the timescales allowed.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held); 21(1) (Review by Scottish public authority)

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 8 September 2016, Mr Carrell made a request for information to the Scottish Ministers (the Ministers). The request concerned the Scottish Government's consultation on an interim constitution for Scotland¹, which closed in October 2014. The information requested was as follows:
 - (a) The current and/or final status of the consultation exercise carried out by the Scottish Government on a written constitution for an independent Scotland, prior to the September 2014 independence referendum. Please include the dates of all relevant decisions.
 - (b) Was the final decision taken by the Scottish Government on the fate of the consultation discussed by the Cabinet? If so, when and for what purpose?
 - (c) An account of the action taken by the Scottish Government with the consultation responses submitted to it and the final documents associated with the consultation, including but not exclusively:
 - i. any final report or memoranda from either the external firm conducting the analysis of the responses as well as Scottish Government papers summarising or reporting on that process, or
 - ii. any interim analysis of the responses
 - (d) For instance, have the consultation responses been kept or destroyed? If they have been kept, why?

¹ <https://consult.scotland.gov.uk/elections-and-constitutional-development-division/scottish-independence-bill/>

- (e) Please disclose the full cost of the consultation exercise, broken down to include internal civil service staff time, printing costs and the costs of the external analysis, and all other costs attributed to the written constitution consultation exercise.
2. The Ministers did not respond. On 7 October 2016, Mr Carrell wrote to them requesting a review of their failure to respond.
3. The Ministers notified Mr Carrell of the outcome of their review on 25 November 2016.
- In relation to part (a) of the request, the Ministers informed Mr Carrell that the consultation had closed in October 2014. They provided a link to the consultation responses, which had been published previously on the Scottish Government's website². The Ministers also informed Mr Carrell that decisions were made in the usual course of managing a consultation process, and that they did not hold the specific dates of decisions.
 - In relation to part (b) of the request, the Ministers informed Mr Carrell that the final decision on the consultation was not discussed by the Cabinet. They referred again to their response to part (a) of the request.
 - In relation to part (c) of the request, the Ministers informed Mr Carrell that, in line with standard consultation procedures, a high-level initial analysis of consultation responses was carried out; this was conducted in-house by Scottish Government officials. The Ministers stated that, given the outcome of the referendum and resultant re-aligning of Ministerial priorities and work programmes, no further analysis was required and the initial analysis was not retained. The Ministers informed Mr Carrell, in terms of section 17(1) of FOISA, that they did not hold this information.
 - In relation to part (d) of the request, the Ministers informed Mr Carrell that the responses had been retained and published, referring him to the link provided in response to parts (a) and (b) of the request.
 - In relation to part (e) of the request, the Ministers informed Mr Carrell (in terms of section 17(1) of FOISA) that they did not hold the information requested. Work on the consultation was done by existing staff as part of their standard duties: in line with usual practice, the time taken was not recorded. There were no printing costs, the consultation generally having been conducted online, and no external analysis was carried out. Any other costs were included in the wider work programme for the referendum and there was no detailed breakdown.
4. On 30 November 2016, Mr Carrell wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Carrell stated he was dissatisfied with the outcome of the Ministers' review as he did not believe he had all the information he sought. Specifically, he cited
- the dates on which key decisions had been made (part (a) of the request)
 - the cost of the consultation exercise (part (e) of the request), querying the response on staff time in particular
 - the information requested in part (c) of the request.

² https://consult.scotland.gov.uk/elections-and-constitutional-development-division/scottish-independence-bill/consultation/published_select_respondent

Additionally, Mr Carrell was dissatisfied with the Ministers' failure to respond to his request and requirement for review within the timescales laid down in FOISA.

Investigation

5. The application was accepted as valid. The Commissioner confirmed that Mr Carrell 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.
6. On 23 December 2016, the Ministers were notified in writing that Mr Carrell had made a valid application. 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. The Ministers were invited to comment on this application, and answer specific questions. In particular, the Ministers were asked to clarify the steps they had taken in order to identify and locate any information falling within the scope of the request.

Commissioner's analysis and findings

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

Compliance with timescales

9. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case.
10. It is a matter of fact that the Ministers did not provide a response to Mr Carrell's request for information within 20 working days, so the Commissioner finds that they failed to comply with section 10(1) of FOISA.
11. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review. Again, this is subject to qualifications which are not relevant in this case.
12. It is a matter of fact that the Ministers did not provide a response to Mr Carrell's requirement for review within 20 working days, so the Commissioner finds that they failed to comply with section 21(1) of FOISA.
13. The Ministers explained that the Constitutional Policy Team (CPT) was very small and busy and had a significantly expanding policy programme as a result of Brexit – consequently, resources were stretched. The Ministers stated that, at the time when Mr Carrell's request was being dealt with, the CPT had a number of competing priorities. These included: providing advice to Ministers on the implications of the UK exiting the EU, drafting relevant content for the Scottish Government publication "Scotland's Place in Europe", supporting the Lord Advocate with the Article 50 court case, and responding to other information requests and correspondence.
14. The Ministers acknowledged that, in trying to balance these competing and changing priorities, there had been some slippage in some areas (including in relation to this request).

The Ministers considered that the CPT now had the resources in place to manage its workload.

15. The Commissioner notes the Ministers' explanation for their failure to respond to Mr Carrell's request and the delay in responding to his requirement for review. While she appreciates that the Ministers have competing demands, she expects them (and Scottish public authorities generally) to ensure they have sufficient resilience within their organisations to fulfil their statutory responsibilities under FOISA.
16. The Commissioner would suggest that the Ministers take steps to ensure they have sufficient resources in place in order to respond to requests timeously in future. The failures to respond timeously to Mr Carrell's request and requirement for review have been noted. These failures may be taken into account by the Commissioner in determining whether action is required under her Enforcement Policy and Intervention Procedures.

Has all relevant information been identified?

17. The Ministers explained the searches they had undertaken. They searched their electronic Records and Document Management system. The Ministers identified the search terms that had been used and the outcome of those searches. The Ministers confirmed that, having checked any documents returned by these searches, none were found to fall within the scope of the request.
18. The Ministers also stated that key officials involved in the project were consulted and required to carry out searches of their individual records. No relevant information was located.
19. The Commissioner has considered the Ministers' explanation of the searches and enquiries undertaken and why those searches and enquiries would have been likely to identify and locate any relevant information.
20. The Commissioner accepts that the Ministers undertook reasonable, proportionate searches and enquiries in the circumstances, with a view to locating and identifying any information falling within the scope of Mr Carrell's request. She accepts that any relevant information would have been identified using the searches and enquiries described by the Ministers.
21. The Commissioner is therefore satisfied that the Ministers identified all of the relevant information they held when responding to Mr Carrell's request.

Section 17 – information not held

22. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received, subject to qualifications which are not applicable in this case. Under section 17(1), where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect.
23. In this case, the Ministers gave notice to Mr Carrell that they did not hold the information requested concerning key dates, the analyses of responses and the cost of the consultation.

Parts (a) and (c) of the request

24. Parts (a) and (c) of Mr Carrell's request asked for information on the dates of key decisions (part 1) and action taken in response to the consultation, including final reports and analyses of the consultation responses (part (c)).

25. In his application to the Commissioner, Mr Carrell stated that he found it hard to believe that there were no records of when decisions had been made on the fate or handling of the consultation. In his view, the civil service relied heavily on emails to pass on and agree decisions. Mr Carrell also queried why the analysis of the consultation had not been retained.
26. The Ministers stated that routine decisions relating to the day-to-day administration of the consultation were made in the usual course of managing a consultation process. When the independence referendum was over, there was no longer any need for a written constitution for an independent Scotland. This automatically meant that no further work was needed on either the constitution or the consultation: accordingly, that work ceased.
27. The Ministers submitted that these were all routine administrative decisions, of a kind which officials make on a day-to-day basis as part of their jobs and in response to changing circumstances. The Ministers stated that these were not formal decisions which required any written discussion or authorisation, so they held no recorded information on the specific dates of these decisions.
28. In relation to the analysis of consultation responses, the Ministers stated that a high-level, in-house, initial analysis of responses was made. However, as the Scottish Independence Bill was not to be implemented and the consultation was not to be progressed, no further analysis was required. The Ministers stated that the initial analysis was just a working document held by one individual on their PC and so they deleted it when it was no longer required. The Ministers stated that this document was not saved in any official record and so fell outside the requirements of their records management policy and formal retention periods.
29. The Commissioner has considered the representations made by both Mr Carrell and the Ministers.
30. The Commissioner is surprised at the apparent lack of record keeping in this case and particularly by the fact that the analysis document under consideration was seemingly kept only on one individual officer's PC.
31. That said, the Commissioner acknowledges the perception that there would have been no need to retain information of this nature after the outcome of the referendum was known. Given the explanation provided, she is satisfied that the Ministers do not (and did not, on receiving Mr Carrell's request) hold the information sought in relation to key decision dates for part (a) of the request and response analyses for part (c).

Part (e) of the request

32. In his application to the Commissioner, Mr Carrell stated that the Ministers had made no attempt to estimate the staff time and costs involved in the consultation exercise. He submitted that, if the Scottish Government claimed it had no need or duty to record staff time as a cost for its work and policy making, that would establish a principle which weakened transparency. In his view, this would make it far harder to establish what level of resource was being used on many other policies.
33. The Ministers reiterated that the work on the consultation was carried out by existing members of staff as part of their standard duties. Reflecting usual practice, the number of hours that staff spent on individual tasks was not recorded, as they had no business need for that information.

34. The Ministers explained that, for the same reasons, they did not hold an estimate of the costs, nor did they have information which would enable them to produce a reasonable estimate. The Ministers pointed out that there is no requirement for a Scottish public authority to create new information in order to respond to an information request and that FOISA only gives a right of access to recorded information held at the time of the request. The Ministers added that staff carry out a variety of tasks in their working day and that gathering and collating that information for all 5,000+ staff in the core Scottish Government would be very costly and time consuming.
35. The Commissioner accepts that the Ministers did not (and do not) hold this information. There is no requirement for public authorities to record the time staff spend on specific duties, although the practice is prevalent in some parts of the public sector. In the circumstances, having considered the relevant submissions, she would not expect the Ministers to hold this information.
36. The Commissioner notes Mr Carrell's view that the Ministers could have provided an estimate of the staff costs involved. However, as the Ministers have correctly pointed out, there is no requirement under FOISA for an authority to create new information in order to respond to an information request and the Commissioner has no powers to require them to do so.

Conclusion on section 17

37. The Commissioner accepts that the Ministers were correct to give Mr Carrell notice, in terms of section 17(1) of FOISA, that they held no information falling within the scope of the above parts of his request.

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 Carrell.

The Commissioner finds that the Ministers were correct to give notice, in terms of section 17(1) of FOISA, that they did not hold some of the information requested.

However, by failing to comply with the timescales laid down in sections 10(1) and 21(1), the Ministers failed to comply with Part 1 of FOISA.

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

Appeal

Should either Mr Carrell 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.

Margaret Keyse
Head of Enforcement

14 March 2017

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.

...

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

...

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.

...

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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info