

Decision Notice

Decision 125/2018: Mr W and the Scottish Ministers

Cost of website: <https://www.budget.scot/>

Reference No: 201800351

Decision Date: 14 August 2018



Scottish Information
Commissioner

Summary

The Ministers were asked for information on the cost of the creation and maintenance of the website <https://www.budget.scot/>.

The Ministers applied section 27(1) of FOISA, claiming they intended to publish the information within 12 weeks of the date of the request. The applicant remained dissatisfied with the Ministers' response and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had failed to deal with the request for information in accordance with Part 1 of FOISA, by incorrectly relying on section 27(1) of FOISA to withhold the information requested. Given that the information was disclosed during the investigation, he did not require the Ministers to take any action in this particular case.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 27(1) (Information intended for future publication)

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 21 December 2017, Mr W made a five-part request for information to the Scottish Ministers (the Ministers). The information requested was "The total cost of the creation and maintenance of the website: <https://www.budget.scot/>." [Part 1 of request]

Mr W asked that the information include:

- The cost (initial and annual) of the domain name. [Part 2 of request]
 - The cost of the design and creation of the website (including components such as Graphical User Interface, items on the page, background etc., as well as the creator and their associated costs). [Part 3 of request]
 - The time taken to create the website from start to finish. [Part 4 of request]
 - The name of the person who requested the website be created in the first place. [Part 5 of request]
2. The Ministers responded on 22 January 2018. They informed Mr W that the information requested was considered exempt from disclosure under section 27(1) (Information intended for future publication) of FOISA, claiming it was their intention to publish the information on 28 February 2018, i.e. within 12 weeks of receipt of Mr W's request. They believed the public interest favoured maintaining the exemption.
 3. On 23 January 2018, Mr W wrote to the Ministers, requesting a review of their decision as he considered it was in the public interest to disclose the information requested before completion of the Scottish Budget process, which was due to be debated and decided upon throughout February 2018. This, Mr W argued, would provide the opportunity to scrutinise

the way in which the Scottish Government operated and would impact the level of trust elected members could place in its budgetary plans.

4. The Ministers notified Mr W of the outcome of their review on 20 February 2018, upholding their original decision with modifications. The Ministers' review outcome failed to address part 1 of Mr W's request. For parts 2 and 3, the Ministers upheld the application of section 27(1). For parts 4 and 5, the Ministers informed Mr W that they did not hold the information requested, applying section 17(1) (Notice that information is not held) of FOISA.
5. On 21 February 2018, Mr W wrote to the Commissioner's office, applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr W stated he was dissatisfied with the outcome of the Ministers' review because he disagreed with their rationale for withholding the information requested in parts 2 and 3 of the request under section 27(1) of FOISA. Mr W also believed it unlikely that the Ministers did not hold any information for parts 4 and 5.
6. Mr W again wrote to the Commissioner on 8 March 2018, noting that the information sought in part 1 of his request had now been published on the www.budget.scot website. He queried whether the Ministers had intended to publish the remaining information.
7. On 23 March 2018, the Ministers provided Mr W with the information sought in part 2 of his request, apologising for the oversight in not publishing this separately.
8. Mr W subsequently clarified to the Commissioner that he was raising no dissatisfaction with the Ministers' responses to parts 1, 4 and 5 of his request. He confirmed that he remained dissatisfied with the Ministers' decision to rely on section 27(1) for parts 2 and 3 of his request, believing that the intention to publish was only decided following receipt of his information request. Mr W contended that the Ministers had applied section 27(1) as a deliberate "delaying tactic", and that this exemption had been suggested at the stage where those he considered to have a political interest in withholding the information (such as Special Advisers) had an input.
9. Accordingly, this investigation will focus on the Ministers' handling of parts 2 and 3 of Mr W's request.

Investigation

10. The application was accepted as valid. The Commissioner confirmed that Mr W made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
11. On 14 March 2018, the Ministers were notified in writing that Mr W had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr W pertaining to parts 2 and 3 of his request.
12. The Ministers informed the Commissioner on 23 March 2018 that no information was being withheld in this case, as all relevant information had by then been either published or disclosed to Mr W. The case was then allocated to an investigating officer.
13. 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, with particular reference to their application of section 27(1) of FOISA. The Ministers were again asked to provide the

information pertaining to parts 2 and 3 of Mr W's request, given that this had been withheld at review stage under section 27(1) of FOISA.

14. Mr W was also asked for his submissions on the public interest in disclosing the information for parts 2 and 3 of the request.
15. Both parties provided submissions to the Commissioner. This included provision of the withheld information by the Ministers.

Commissioner's analysis and findings

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

Section 27(1) – Information intended for future publication

17. Section 27(1) provides that information is exempt from disclosure where the following tests are met:
 - (i) the information is held with a view to its being published by a Scottish public authority or any other person at a date not later than 12 weeks after that on which the request for the information is made;
 - (ii) when the request is made, the information is already being held with that view; and
 - (iii) it is reasonable in all the circumstances that the information be withheld from disclosure until the intended publication date.
18. This exemption recognises that where it is already intended to make information available, public authorities should, within reason, have space to be able to determine their own publication timetables and deal with the necessary preparation, administration and context of publication.
19. It should be noted that there is no requirement within section 27(1) that publication must actually take place as planned, but the information must already be held with a view to publication at the time the request is received. The exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.

Was the information held with a view to publication at the time of the request?

20. It is key to the application of this exemption that the Ministers must be able to establish that they already intended to publish the information, when they received the request. The information must have been held with a view to publication (within 12 weeks) at that time.
21. Section 27(1) cannot apply if the Ministers only decided to publish the information after the request was received. During debates on the Bill which became FOISA within the Justice 2 Committee of the Scottish Parliament, there was a discussion of the inclusion of a timescale in section 27(1) of FOISA. It was commented by the then Justice Minister, Jim Wallace, that section 27 "applies only when the authority in question has a publication date in mind", explaining that the provision was "not meant to offer a delaying tactic". [Col 3234]¹

¹ <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=2020&i=9492&c=346126&s>

22. In his submissions to the Commissioner, Mr W believed the Ministers had incorrectly applied the exemption in section 27(1) to parts 2 and 3 of his request. He did not accept that, prior to submission of his information request, the Ministers had any intention of publishing the information, and that they had applied section 27(1) purely as a method of delaying disclosure of the information until after the Budget 2018-19 parliamentary process.
23. Mr W also made reference to a subsequent information request where, in their response, the Ministers had confirmed the involvement of Special Advisers when responding to the request under consideration here. Mr W was dissatisfied that political appointees appeared to have intervened to delay disclosure of the information “with a poorly concealed excuse of ‘planned publication’”.
24. The Ministers were asked to provide evidence of a stated intention to publish the information sought in parts 2 and 3 of Mr W’s request, at the time the request was made (i.e. 21 December 2017).
25. In response, the Ministers confirmed that while there was understood to be an intention to publish the information, there was no evidence predating Mr W’s request of any settled intention to publish. In the circumstances, they confirmed that they no longer wished to rely on section 27(1) of FOISA.
26. The Ministers provided the Commissioner with copies of internal communications relating to the handling of parts 2 and 3 of Mr W’s information request. This did not suggest that there had been any intention to publish prior to receipt of the request. While the Ministers’ submissions explained why they considered it was in the public interest for the information not to be made available until 28 February 2018, as stated in the review outcome, they provided no coherent explanation as to when, or how, the intention to publish arose.

Commissioner’s conclusions

27. The Commissioner has fully considered the terms of the parts 2 and 3 of Mr W’s request, the withheld information and the submissions from both Mr W and the Ministers.
28. The Ministers have confirmed they hold no evidence to show, at the time they received Mr W’s request, that they had formed any clear intention to publish the information requested, whether within 12 weeks or any other timescale. Their internal correspondence relating to the handling of the request tends to suggest that the intention to publish arose only in response to the request. In these circumstances, the Commissioner cannot accept that the information requested was held with a view to publication by the Ministers not later than 12 weeks after receipt of the request.
29. It does not necessarily follow that section 27(1) was applied only as a “delaying tactic”, and there is nothing in the correspondence to suggest that it was applied for political or tactical reasons. It may be that it would have been reasonable not to publish until 28 February 2018, and that there were arguments in the public interest for taking this course of action, although it must be noted that publication of the requested information (to the extent that it was held by the Ministers) was not realised fully within that timescale. Nevertheless, on the balance of probabilities, the Commissioner is not satisfied that a pre-existing intention to publish can be established – without that intention, he cannot find that the Ministers were entitled to apply the exemption in section 27(1) of FOISA.
30. As the information requested by Mr W in parts 2 and 3 of his request has now been made available to him, the Commissioner does not require the Ministers to take any action in this particular case.

31. The Commissioner notes that the Ministers are taking steps to address the issues raised in their handling of this particular request, with a view to avoiding any similar future recurrence. He would suggest that these should include developing a clearer understanding amongst all relevant staff of the circumstances in which the exemption in section 27(1) can properly be claimed.

Decision

The Commissioner finds that the Scottish 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 W. Specifically, he finds that the Ministers were not entitled to withhold the information Mr W had requested in parts 2 and 3 of his request under the exemption in section 27(1) of FOISA.

Given that the information under consideration here has since been made available to Mr W, the Commissioner does not require the Ministers to take any action in respect of this failure, in response to Mr W's application.

Appeal

Should either Mr W 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 August 2018

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.

...

27 Information intended for future publication

- (1) Information is exempt information if-
- (a) it is held with a view to its being published by-
- (i) a Scottish public authority; or
- (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

- (b) when that request is made the information is already being held with that view; and
- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

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