

# Decision Notice 083/2021

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## Handling of harassment complaints involving current or former ministers

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**Applicant: The Applicant**

**Public authority: Scottish Ministers**

**Case Ref: 202001437**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked for information regarding the handling of harassment complaints involving current or former ministers.

The Ministers initially withheld some of the information on the basis that it was exempt from disclosure. However, at review stage, it told the Applicant it did not hold the information.

The Commissioner investigated and found that the Ministers did in fact hold the information.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (3) and (4) (General entitlement); 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

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1. On 19 August 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). The request was as follows:

*Since the introduction of the Handling Harassment Complaints procedure in the Scottish Government detailed here: <https://www.gov.scot/publications/handling-of-harassment-complaints-involving-current-or-former-ministers/> please provide the below information.*

- 1) *The date, nature of allegation, and the name of the person alleged to have harassed someone for each complaint dealt with using this procedure.*
- 2) *The outcome of each complaint including any official report.*
  - (a) *If a meeting took place as part of the outcome of the investigation into the complaint, I request the date, time, location, attendance record, agenda, minutes and any handouts provided to attendees.*
- 3) *Whether the harassment procedure has been used since the judicial review in 2018 won by the former First Minister Alex Salmond?*
  - (a) *If not, why not?*

2. The Ministers responded on 17 September 2020. They:

- referred the Applicant to information that was in the public domain, relying on section 25(1) (Information otherwise accessible) of FOISA (request 1)
- withheld information under sections 26(c) (Prohibitions on disclosure), 30(b)(i) and (ii) (Prejudice to effective conduct of public affairs), 35(1)(g) (Law enforcement), 36(1) (Confidentiality) and 38(1)(b) (Personal information) of FOISA (requests 2) and 2a)
- gave the Applicant notice, under section 17(1) of FOISA, that they did not hold any information falling within the scope of requests 3) and 3a)

3. On 28 September 2020, the Applicant wrote to Ministers requesting a review of their decision on the basis that the exemptions applied to the information held for questions 2) and 2a) had been applied incorrectly and that there was an obvious and overwhelming public interest in the harassment complaints procedure.
4. The Ministers notified the Applicant of the outcome of their review on 26 November 2020. They withdrew their reliance on all of the exemptions they had previously applied to requests 2) and 2a), and instead chose to rely on section 17(1) of FOISA, arguing that they did not hold the information requested.
5. By way of explanation, the Ministers noted that the Applicant was seeking information about the “outcome” of each complaint. They commented that, while an official report into the complaints had been completed on 21 August 2018, as a result of judicial review proceedings, the Court of Session had reduced the report, meaning that it had no legal effect. Following the Court’s decision, the First Minister had stated that it was open to the Scottish Government to reinvestigate the complaints once the ongoing police investigation had concluded. In light of this, the Ministers argued that they did not hold the requested information because an outcome had not yet been reached in relation to either complaint.
6. On 1 December 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers’ review because it was provided late and because he did not accept the Ministers’ interpretation of his request and their reliance on section 17(1) of FOISA. The Applicant argued that, while the outcome of the complaints was reduced by the Court, this does not mean that an outcome was not reached, nor does it follow that the Scottish Government holds no information on the matter.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
8. On 15 December 2020, the Ministers were notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
9. 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 to answer specific questions regarding their decision to notify the Applicant that they did not hold the information falling within the scope of requests 2) and 2a).

## Commissioner’s analysis and findings

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

### *The Ministers’ interpretation of the request*

11. In their submissions, the Ministers explained that the complaints procedure referred to by the Applicant had been used in relation to two complaints made about the former First Minister, Alex Salmond. On 29 August 2018, Mr Salmond commenced judicial review proceedings

against the Scottish Government in which he sought to review the handling of those complaints.

12. The Ministers noted that, on 8 October 2018, Lord Woolman made an order under section 11 of the Contempt of Court Act 1981 restraining the publication by any means of information relating to the complainers. The order also allowed the complainers to be referred to as Ms A and Ms B in the judicial review proceedings. The Ministers provided the Commissioner with a copy of the order.
13. On 8 January 2019, the judicial review proceedings were concluded. The Ministers commented that, when the proceedings were disposed of, Lord Pentland emphasised that the section 11 order continued (and continues) to have effect.
14. Against this factual background, the Ministers stressed that the request was a particularly sensitive one. It seeks to obtain information about the outcome of a complaints procedure when that outcome has been reduced by the Court of Session, and when orders have been made by the Court prohibiting the disclosure of information that would lead to the identification of the complainers.
15. The Ministers explained that, in their review outcome, they substituted a new decision in respects of requests 2) and 2a) indicating that they did not hold the information.
16. The Ministers noted that the Applicant had asked for the “outcome” of the complaints, including any official report. They reiterated that the “purported” decision report of 21 August 2018 was reduced by the Court of Session on 8 January 2019. The Ministers explained that the reduction of a document deprives it of all legal force and effect, and accordingly it is their contention that the reduced decision report does not represent the outcome of the complaints in question.
17. The Ministers submitted that the practical effect of reduction on a decision is to return matters to the position that they were in before the decision was taken. Given this, the Ministers considered that the direct consequence of the decree of reduction is that the complaints in question have not yet reached an outcome. They contended that their view is fortified by the fact that the Court also reduced the investigating officer’s reports on which the decision report rested.
18. The Ministers referred to the First Minister’s comments to Parliament in her statement on 8 January 2019, that it remains open to the Scottish Government to reinvestigate the complaints (Official Report, 8 January 2019, cols. 61 and 62<sup>1</sup>). The Ministers argued that the Scottish Government would not be in a position to do this had the complaints process reached an outcome.
19. The Ministers disagreed with the Applicant about whether an outcome has been reached in the two complaints in question. It is their position that no such outcome has been reached. They contended that, while the reduced decision report of 21 August 2018 appeared to represent an outcome, it ceased to be the outcome when reduced and the matter remains open for redetermination.
20. The Ministers submitted that the question is not whether the reduced decision report exists or not. It is whether it is within the scope of the request. They argued that the Applicant did not ask for the reduced decision report, and that it was public knowledge by the time the request

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<sup>1</sup> <https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=11871&mode=pdf>

was made that the decision had been reduced. While the Ministers acknowledged that they do hold the reduced decision report, they contended that the Applicant did not ask for it. He asked for something which does not exist, and accordingly they argued that they were correct to give notice under section 17(1) of FOISA.

21. The Ministers were questioned on the interpretation of the request and whether it was unduly narrow. In response, the Ministers stated that they did not accept that the interpretation of the request at the point of responding to the review was unduly narrow. The Ministers submitted that the decision-making process in question is a quasi-judicial one and they did not consider that there is a legitimate distinction to be drawn between the “outcome” and the “final, legal, outcome”: in their view, they are one and the same. To say otherwise would, according to the Ministers, undermine the decision of the Court of Session in the judicial review proceedings.
22. It was also pointed out to the Ministers that it seemed clear that, in his request, the Applicant was seeking the reduced decision report. The Ministers disagreed with this view. The Ministers argued that, if they were to provide the reduced decision report in response to the Applicant’s request, that would necessarily imply that the Scottish Ministers considered that reduced document to represent the outcome of the complaints in question. The Ministers contended that that does not represent their position, either as set out in disposing of the judicial review proceedings or in the First Minister’s statement to the Parliament on 8 January 2019.
23. The Ministers were asked if they had offered the Applicant any advice on rephrasing his request to capture the “reduced decision report”. The Ministers confirmed that they had not done so and they referred to the comments of the Inner House of the Court of Session in *Glasgow City Council v Scottish Information Commissioner* [2009] CSIH 73<sup>2</sup>, at paragraph 45:

*In particular, although there will be cases where the request is made by persons who can be expected to describe precisely what it is that they wish to receive (the present case, where the requests were made by solicitors on behalf of a commercial client, being a paradigm case), there will also be cases where requests are made by individuals who cannot be expected to express themselves with precision. Allowance has to be made for that possibility in the application of the Act; and that is reflected, in particular, in the duty placed upon public authorities by section 15 of the Act to provide advice and assistance to a person who proposes to make, or has made, a request for information.*

24. The Ministers argued that in this passage the Court acknowledged that a spectrum exists in relation to the precision that can be expected in framing requests. At one end of the spectrum, the Court clearly envisaged that a solicitor making a request on behalf of a commercial client could “...be expected to describe precisely what it is that they wish to receive”. The Ministers noted that some requesters find it challenging to express in writing what they are seeking (and they would clearly fall at the other end of the spectrum). In this case, the Ministers argued that the Applicant is a professional journalist who represents a national newspaper and that the making of information requests is a part of his professional role, as it was for the firm of solicitors in *Glasgow City Council*. The Ministers submitted that it is not unreasonable to expect requesters in the Applicant’s position to “describe precisely what it is that they wish to receive”.

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<sup>2</sup> <https://www.scotcourts.gov.uk/search-judgments/judgment?id=cc8f86a6-8980-69d2-b500-ff0000d74aa7>

25. The Ministers note that the Court goes on to observe that allowance has to be made for requests made by individuals who cannot be expected to express themselves with precision, and that this is reflected in the section 15 duty. The Ministers contended that the extent of that duty depends on the degree of precision which can reasonably be expected of a particular requester.
26. The Ministers submitted that, if the Commissioner considers them to be wrong in their understanding of the above passage, they would observe that it would not have assisted the Applicant had they suggested that he rephrase his request to ask for the reduced decision report as they considered the reduced decision report in its entirety to be exempt from disclosure in terms of section 26(c) of FOISA. The Ministers went on to provide the Commissioner with their reasons for believing that section 26(c) of FOISA applied to the reduced decision report.

*The Applicant's interpretation of the request*

27. The Applicant fundamentally does not accept the Ministers' interpretation of his request and their application of section 17(1) of FOISA. The Applicant noted that he had asked for the outcome of any complaint including an official report, and this was not provided to him on the claim that the outcome of the complaints in question is ongoing. The Applicant contended that this is categorically inaccurate.
28. The Applicant acknowledged that the outcome of the complaints were reduced by the Court of Session so they have no legal effect, but he argued that this does not mean that an outcome was not reached, nor does it follow that the Ministers hold no information on the topic. The Applicant argued that either the decision report exists and is held by the Ministers or the judicial review did not take place and the report was not handed over to the Crown Office in connection with the criminal investigation into Mr Salmond.
29. The Applicant contended that the retrospectivity of the decision to reduce the report does not scrub it from existence in a freedom of information sense. The Applicant acknowledged that it may do that in terms of its legal effect on both the complainants and the accused, and that the decision may also have legal ramifications for the Ministers in terms of costs, etc. but it still, fundamentally, exists.
30. The Applicant submitted that the decision report is at the heart of a parliamentary inquiry, it was at the heart of a judicial review, and it was included in evidence for the criminal trial of a former First Minister (Mr Salmond). The Applicant argued that, in order for the public to be fully informed and to be able to hold the Scottish Government to account, the report must be disclosed into the public domain, with appropriate redactions. The Applicant argued that this goes to the heart of the issue on transparency and accountability.
31. The Applicant further submitted that his request asked for the "outcome" not the "final outcome" as the Ministers chose to interpret it. The Applicant noted that, due to the Ministers changing their reliance on exemptions at the review stage, he was unable to challenge the interpretation of his request in his requirement for review. The Applicant asked the Commissioner to take this into account and he reiterated his view that the Ministers hold the information he requested in 2) and 2a) and that this information should be disclosed.

*The Commissioner's view on the interpretation of the request*

32. In interpreting information requests, the Commissioner believes that the words used in the request should generally be given their plain, ordinary meaning. Similarly, the Commissioner expects requests to be interpreted in an objective manner, rather than with reference to what

a public authority considers a requester may have intended. If there is any doubt over the information that an applicant wishes to obtain when making a request, the public authority should seek clarification from the applicant without delay. Section 1(3) of FOISA permits an authority to contact the requester and seek further information in order to identify and locate the information that has been requested.

33. The Commissioner has considered the terms of the Applicant's request carefully. He considers that, on a plain English reading, the Applicant has not made the information request claimed by the Ministers. The Ministers have made extensive arguments as to why their interpretation of the request is correct. However, he notes that the Ministers did not seek clarification under section 1(3) of FOISA, and that their initial response seems to clearly have identified and understood what information the Applicant was seeking.
34. In the Ministers' original response to the Applicant, they stated that they could not provide the information he had requested because it was exempt from disclosure, and they gave details of six separate exemptions that they considered to apply to the information. The Ministers did not question the Applicant on the scope of the request or seek clarification about the information he was looking for, nor did they indicate that the information was not held. It was only in the review outcome that the Ministers decided to take a new interpretation of requests 2) and 2a) and conclude that the information was not held.
35. The Commissioner does not accept the Ministers' overly legalistic interpretation of the Applicant's request and he cannot see any reason for the Ministers' decision to apply section 17(1) in their review outcome, when the original response indicated that the Ministers understood the request and had identified the withheld information.
36. The Commissioner is aware that the Applicant is a professional journalist, but he rejects the Ministers' arguments that, in order for this request to have captured the reduced decision report, the Applicant would have had to have used those specific terms in his request for information. The Commissioner considers that the Applicant made a clearly worded request which captured the reduced decision report. Even if the Applicant fell into the category of persons who can be expected to describe precisely what information they wish receive, as envisaged by the Court of Session in *Glasgow City Council*, the Commissioner would still expect an authority to have understood the information that was captured by request 2) and 2a), rather than simply deny that the information existed because the terminology used did not exactly match that used by the authority. This appears to be overly pedantic.
37. Requesters are not expected to know how a public authority stores information or how it is named before making an information request under section 1(1) of FOISA. All requesters have to do is to describe the information they are seeking in a manner that can be understood by the authority processing the request. There is no doubt in the Commissioner's mind that the Applicant clearly identified the information he requested and that the Ministers understood exactly what information they were being asked for.
38. In conclusion, the Commissioner does not accept the Ministers' interpretation of the Applicant's request. The Commissioner is satisfied that it was clear what information the Applicant had requested, and that request 2) which specifically refers to "*any official report*" captures the reduced decision report. The Commissioner finds that the Ministers were wrong to interpret the request the way they did.

## **Section 17(1) of FOISA**



39. 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. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
40. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
41. As noted above, the Ministers have acknowledged that they do hold the reduced decision report but they have contended that the Applicant did not request it. The Ministers' arguments are based on the (wrong) supposition that the Applicant had not requested the reduced decision report, but instead had asked for information which did not exist, and therefore was not held.
42. For the reasons outlined above, the Commissioner does not accept the Ministers' interpretation of the Applicant's request, and he finds that the reduced decision report does fall within the scope of request 2). As the Ministers have confirmed that they hold the reduced decision report, the Commissioner must conclude that the Ministers were wrong to give the Applicant notice, under section 17(1) of FOISA, that the information he had requested was not held.
43. The Commissioner is satisfied that the Ministers incorrectly relied on section 17 in this case and therefore failed to comply with Part 1 of FOISA in responding to the Applicant's request.

### **Section 21(1) of FOISA**

44. 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. This is subject to qualifications which are not relevant in this case.
45. The Ministers expressed regret that their review response was issued late, and they noted that they had apologised for this at the time. Given the particular sensitivity of the information requested in questions 2) and 2a) of the request, they explained that only a very limited number of Scottish Government staff were in a position to handle the original request or to undertake a review.
46. The Ministers submitted that the delays arising in responding to this requirement for review are particular to the specific case, and they apologised again for the lateness of the response.
47. The Commissioner notes the Ministers' comments, but it is a matter of fact that the Ministers did not provide a response to the Applicant's requirement for review within 20 working days, so the Commissioner finds that they failed to comply with section 21(1) of FOISA.

## **Decision**

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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 the Applicant, by incorrectly stating that no information was held. It therefore failed to comply with section 1(1).



The Commissioner also finds that the Ministers breached section 21(1) of FOISA, by failing to respond to the Applicant's requirement for review within 20 working days.

The Commissioner requires the Ministers to provide the Applicant with a new review outcome, by 12 July 2021.

In carrying out a new review, the Ministers must provide the Applicant with a decision in relation to the requests 2) and 2a), other than finding that the information is not held by the Ministers for the purposes of FOISA.

## **Appeal**

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Should either the Applicant or the 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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**  
**27 May 2021**

## Appendix 1: Relevant statutory provisions

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### 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.

...

- (3) If the authority -
- (a) requires further information in order to identify and locate the requested information; and
  - (b) has told the applicant so (specifying what the requirement for further information is),

then provided that the requirement is reasonable, the authority is not obliged to give the requested information until it has the further information.

- (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.

...

#### 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.

...

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