

# Decision Notice

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## Decision 119/2015: Mr Tommy Kane and the Scottish Ministers

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### Use of private contractors in the NHS

Reference No: 201500296

Decision Date: 28 July 2015



Scottish Information  
Commissioner

## Summary

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On 1 September 2014, Mr Kane asked the Scottish Ministers (the Ministers) for correspondence relating to the use of private contractors in Scotland's NHS, the potential for charging of health and social care services and any concerns that Scotland's Health Services might be impacted by changes to the NHS in England. The Ministers disclosed some information, but withheld three documents, on the basis that disclosure would inhibit the free and frank provision of advice. Following a review, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner ordered the Ministers to disclose some of the information which had been withheld from Mr Kane.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections (1) and (6) (General entitlement); 2(1)(b) and (Effect of exemptions); 17(1) (Notice that information is not held); 30(b)(i) (Prejudice to effective conduct of public affairs)

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 1 September 2014, Mr Kane made an information request to the Ministers. He asked for:  
"A copy of all correspondence, notes, emails, faxes, records of phone conversations, texts etc. between the Cabinet Secretary for Health and [Wellbeing] and any government officials/special advisers, members of the Yes Scotland campaign and/or with the Chief Executives of any Scottish health board, during the period from 18th September 2013 until now [1 September 2014], relating to anything to [do] with the use of private contractors in Scotland's NHS, the potential for charging of health and social care services and any concerns that Scotland Health Services might be impacted by changes to the NHS in England."
2. The Ministers responded on 21 October 2014. They disclosed some information, but withheld three documents under section 30(b)(i) and (ii) of FOISA. The Ministers informed Mr Kane that they believed the public interest favoured withholding these documents.
3. On 24 October 2014, Mr Kane wrote to the Ministers requesting a review of their decision. Mr Kane believed the public interest favoured disclosure of the information. He also requested a review of what he called the Ministers' partial response: he suggested that the Ministers had not addressed the part of his request relating to private contractors, the potential for charging of health and social care services, and any concerns that Scotland Health Services might be impacted by changes to the NHS in England.
4. The Ministers notified Mr Kane of the outcome of their review on 19 December 2014. They confirmed their decision, but with modifications. The Ministers supplied a table from a paper on Private Sector Spending by NHS Scotland. The Ministers said that this information was

partly available on their website<sup>1</sup> and was therefore exempt from disclosure under section 25(1) of FOISA. The Ministers continued to withhold some information in terms of section 30(b)(i) of FOISA, but no longer relied on section 30(b)(ii). While recognising the public interest in disclosure of information about health provision and the NHS in Scotland, the Ministers believed the public interest favoured withholding the information due to the importance of a private space within which officials could give free and frank advice.

5. The Ministers acknowledged that their initial response could have been more helpful in relation to aspects of Mr Kane's request, but confirmed that all parts of his request had been considered. The Ministers explained that the Cabinet Secretary does not write directly to Chief Executives. Most correspondence or discussions with Health Boards would be either with the Director General of Health and Social Care or his senior management team, and not directly with the Cabinet Secretary. The Ministers gave Mr Kane notice (in terms of section 17(1) of FOISA) that they did not hold any correspondence with Yes Scotland or special advisers that fell within the terms of his request.
6. On 16 February 2015, Mr Kane wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Kane was dissatisfied that the Ministers' review continued to withhold information that he believed should, in the public interest, be disclosed to him. Mr Kane also believed the Ministers must hold more information that fell within his request.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr Kane 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.
8. On 25 February 2015, the Ministers were notified in writing that Mr Kane had made a valid application. The Ministers were asked to send the Commissioner the information withheld from him. The Ministers provided the information 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 answer specific questions including justifying their reliance on any provisions of FOISA or the EIRs they considered applicable to the information requested.
10. As Mr Kane has not expressed dissatisfaction with the Ministers' reliance on section 25(1) of FOISA, the Commissioner will not consider whether the Ministers' reliance on this exemption complied with Part 1 of FOISA.
11. Mr Kane expressed dissatisfaction that the information he had received was sparse with no explanatory notes. In relation to his request for correspondence between the Cabinet Secretary and others, there was no note to show with whom this was shared or in what context it was shared. The Ministers explained that the information disclosed to Mr Kane was provided in the format in which it was held, with brief context details provided in their response to him. The Ministers provided the Commissioner with further details on this point and agreed that the Commissioner could provide this explanation to Mr Kane. This was done on 13 May 2015.

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<sup>1</sup> <http://news.scotland.gov.uk/News/NHS-to-reduce-private-sector-use-85a.aspx>

12. The Ministers also agreed to disclose further information to Mr Kane, which they did on 8 June 2015.

## **Commissioner's analysis and findings**

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13. 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 Kane and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Section 17(1) - Notice that information is not held**

14. 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.
15. At review, the Ministers explained that the Cabinet Secretary does not write directly to Chief Executives. Similarly, the Ministers stated that they do not hold any correspondence with Yes Scotland or special advisers which falls within the scope of Mr Kane's request. The Ministers therefore gave notice, under section 17(1) of FOISA, that they did not hold information covered by this part of Mr Kane's request.
16. Mr Kane described the information he received as "sparse" and stated that he would be extremely surprised if it represented all the documents discussing the use of private contractors in Scotland's NHS.
17. The first question for the Commissioner is whether the Ministers complied with section 1(1) of FOISA in responding to Mr Kane's request, or whether they held more recorded information that fell within the request. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in this case, more information) is not held.
18. The Ministers were asked to explain what searches they had carried out and why these would have been likely to locate any information covered by the request. The Ministers replied that all papers relating to the use, or potential use, of private contractors in Scotland's NHS were filed (electronically) in the Scottish Government Objective (eRDM) file system. An initial search of the relevant folders was carried out for any documents which fell within the scope of the request. Keyword and parameter searches were completed including: "Independent healthcare" or "private sector" on the waiting times file. The Ministers explained that the "waiting times file" was the title of main electronic file which contains all documents on waiting times policy, including use of the private healthcare sector. This provided a significant number of documents that were not relevant to Mr Kane's request.
19. The Ministers explained that the person who dealt with Mr Kane's request was the lead official on the use of the private sector within Health and therefore understood the information actually held by the Ministers. Using this expertise, the request handler investigated the most recent waiting times eRDM files to isolate the relevant information.

20. The Ministers explained that the search term “charging” was not used as the request handler was aware that no document would be filed with that title. However, the Ministers subsequently searched using the keyword “charging” and confirmed that this search did not retrieve any information relating to health for the time period requested by Mr Kane.
21. The Ministers explained that they had contacted all officials in the Health and Social Care Directorate who might have retained information locally outwith the objective folders during the period of the request. Those contacted included all officials who would have been likely to see any correspondence on the potential for charging of health and social care services and any concerns that Scottish Health Services might be affected by changes to the NHS in England, if there had been any.
22. These officials were asked (by email, provided to the Commissioner) to search all individual electronic storage, including any personal filing and individual email accounts, and any hard copy records they held. The Ministers confirmed that all officials had confirmed (verbally or by email) that they did not hold any relevant information.
23. The investigating officer asked the Ministers to clarify their advice to Mr Kane that “the Cabinet Secretary does not write directly to Chief Executives”. The Ministers explained that the statement reflects the practice of how the Scottish Government operates in its dealings with Chief Executives. The Scottish Government practice is for the Director General for Health and officials to correspond with Chief Executives: the Cabinet Secretary would not correspond directly with Health Board Chief Executives and, as a result, there would be no expectation that any correspondence between the Cabinet Secretary and the Chief Executives would be held.
24. In his application, Mr Kane questioned whether the Cabinet Secretary might write to Health Boards (rather than Chief Executives) directly. The investigating officer asked the Ministers to confirm the position. The Ministers responded that they had not interpreted the request in a way which would exclude any correspondence from the Cabinet Secretary to a Health Board, which was addressed to the Board rather than the Chief Executive. The Ministers reiterated that correspondence to both Health Boards and Chief Executives would normally be signed and issued by the Director General(s) and/or officials.
25. In relation to the information considered to fall outside the scope of Mr Kane’s request, the Ministers explained that this decision was based on a full examination of the document and, for the most part, consisted of routine enquiries to Health Boards about information in their annual accounts. With one exception, discussed in the next paragraph, the Commissioner accepts the Ministers’ view that certain information fell outside the scope of the request.
26. The Ministers provided the Commissioner with a document concerning an information request from another person on a related subject (part of document 3, considered further below). The Ministers believed this information fell outwith the scope of Mr Kane’s request. The Ministers argued that, while the information related indirectly to the use of private sector health care providers, it was clear from Mr Kane’s correspondence that it was not the type of information he was seeking through his request.
27. The Commissioner considered that the information in question does fall within the terms of Mr Kane’s request, which is broadly phrased. The Ministers were informed of this. They provided Mr Kane with some of the information on 8 June 2015, and submitted that the remaining information was exempt from disclosure in terms of section 30(b)(i) of FOISA, and that the public interest favoured withholding the information. The Commissioner will consider whether the information is exempt from disclosure under section 30(b)(i) below.

28. Having considered all the relevant submissions, Commissioner accepts that the Ministers have taken adequate and proportionate steps to establish what information they held which fell within the scope of Mr Kane's request. In reaching this conclusion, the Commissioner has taken into account the following:
- the information falling within the request is held by the Ministers in a searchable database
  - the actual searches undertaken by the Ministers to assess the information it held seem to be reasonable and proportionate and likely to identify relevant information
  - staff involved in searching for the information had experience and knowledge of the subject, reducing the likelihood of searches being faulty or relevant information being overlooked
  - the Ministers contacted staff who may have held information that would not be located by an electronic search, to ensure that no information in hardcopy, personal filing or individual email accounts was overlooked
29. The Commissioner is satisfied, on the balance of probabilities, that the Ministers located all relevant information held by them at the time of the request. She is satisfied that the Ministers correctly gave Mr Kane notice that they did not hold some information covered by his request, as required by section 17(1) of FOISA.

#### **Section 30(b)(i) – free and frank provision of advice**

30. The Ministers withheld information from three documents under the exemption in section 30(b)(i) of FOISA (these documents were numbered 2, 3 and 4 and the Commissioner has used this numbering in her decision). In each case, some information from the document was provided, and some withheld.
31. To rely on the exemption in section 30(b)(i) of FOISA, the Ministers must show that disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
32. In assessing whether the disclosure of the information would, or would be likely to, inhibit substantially the free and frank provision of advice, the Commissioner will take account of factors such as the subject matter, the content of the information and the circumstances existing at the time of the request.
33. As set out in her guidance on the exemptions in section 30(b) of FOISA<sup>2</sup>, the Commissioner takes the view that, in order for the exemption in section 30(b)(i) to apply, the damage caused by disclosing the information must be both real and significant, as opposed to hypothetical or marginal. Also, the damage would have to occur in the near future, and not at some distant time. Furthermore, the harm in question should take the form of substantial inhibition from expressing advice in as free and frank a manner as would be the case if disclosure could not be expected to follow.
34. In the Commissioner's view, where advice is communicated or received as part of an individual's expected day-to-day professional activities, then the risk of substantial inhibition resulting from the release of that information will be diminished.

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<sup>2</sup> <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section30/Section30.aspx>

35. The Ministers submitted that disclosing the information would be likely to substantially inhibit the free and frank provision of advice on this and other particularly sensitive topics in future. The Ministers commented that funding for the NHS, including use of the private sector, has always been a sensitive and complex subject and remains so. Disclosure of this information, the Ministers said, “would make officials much more wary of providing advice which is free and frank in nature for Ministers and others in writing.”
36. The Ministers submitted that it was likely that officials would not provide such comprehensive advice on sensitive topics if they knew such advice was likely to be released, particularly where the officials were making their own assessments or interpretations of what Health Board staff have told them. This inhibition would be substantially prejudicial to the effective conduct of public affairs by leaving Ministers potentially unaware of significant information, and not fully aware of the options. If advice was provided orally, it would lead to a much greater risk of the advice being incorrect or misunderstood. The Ministers argued that it was important that they and their officials are given the private space required as part of the process of exploring and refining the Government’s position on, and oversight of, the NHS in Scotland.
37. The Ministers stated that the position regarding the use of the private sector by Health Boards is a sensitive and constantly evolving picture, where officials rely on Health Boards for information on their expected spending and other plans, which may often not be fully up to date. Given that different Health Boards take different approaches in terms of what is covered by private sector spend, officials were not able to simply copy the information the Boards provided, but had to analyse the data and amend the figures to try to provide a direct comparison between Health Boards; these were not official figures that had been checked for accuracy.
38. Similarly, the Ministers argued that any comments or advice represent an official’s own interpretation of what a Health Board has said, and may not have been endorsed by the Boards. The advice provides a snapshot at a point in time, but would not have reflected an official figure. Officials would be concerned about providing similar “raw” advice in future, if the information covered by Mr Kane’s request was disclosed. However, the Ministers argued that such advice is often needed to give them an informal idea of the current position, even if the information is not likely to be fully accurate.
39. The Ministers also submitted that Health Boards would be more reluctant to provide information on estimated spending in future if they knew that information provided informally was likely to be released into the public domain. If Health Boards did not provide such information, this would significantly harm the ability of officials to provide comprehensive and up-to-date, free and frank advice to Ministers on expected spending.
40. The Ministers provided some arguments relating to the specific information withheld in each document.
41. In relation to the withheld information in document 2, the Ministers explained that the information was prepared to be used, if needed, by the Cabinet Secretary in an appearance before a Scottish Parliament Committee. However, the information was not used. The Ministers said that the lines to take were free and frank advice from an official. While they were drafted to be used publicly if questions were asked on the subject, the figures provided were only estimates at the time and would not have reflected actual spending on the private sector.

42. The Commissioner takes the view that, although it was not used in this way, the information was prepared for possible public communication by a Minister. It was prepared with the knowledge that it might be disclosed. Its disclosure under FOISA is unlikely to inhibit officials from preparing similar “lines to take” in future, given that such advice is prepared with disclosure in mind. She therefore does not accept that it is exempt from disclosure under section 30(b)(i) of FOISA. She requires the Ministers to provide this information to Mr Kane.
43. Part of document 3 has been discussed in paragraphs 26 and 27 above. The remaining information in document 3 is, in the Commissioner’s view, correctly described by the Ministers as comments by an official to explain or contextualise information provided by Health Boards. The Commissioner accepts the Ministers’ submission that, in this instance, it was likely that officials would not provide such comprehensive advice on sensitive topics relating to their own analysis of what Health Boards were doing if they knew such advice was likely to be released, particularly where the officials were making their own assessments or interpretations of what Health Board staff have told them. She also accepts that the Health Boards would not have expected the information to be disclosed in response to an information request, and its disclosure would, or would be likely to, inhibit them from voluntarily providing information in similar circumstances. The Commissioner therefore accepts that the exemption in section 30(b)(i) of FOISA applies to the remaining undisclosed information in document 3.
44. In relation to document 4, the Commissioner found that some of the withheld information can be located in a media report that pre-dates the creation of document 4. The remaining withheld information does not appear to be particularly sensitive in nature, given that statistical information about waiting times is regularly published by Health Boards. The Commissioner does not accept that the withheld information in document 4 has any particular sensitivity, or that there is any other reason why its disclosure is likely to inhibit officials from providing similar advice to Ministers in future. She therefore does not accept that it is exempt from disclosure under section 30(b)(i) of FOISA. She requires the Ministers to provide this information to Mr Kane.
45. Where she has found that the exemption in section 30(b)(i) of FOISA applies to the information withheld from Mr Kane (i.e. some information in document 3), the Commissioner must now go on to consider the application of the public interest test, as set out in section 2(1)(b) of FOISA.

### **Public interest**

46. The exemption in section 30(b)(i) is subject to the public interest test in section 2(1)(b) of FOISA. Where this exemption is correctly applied, the Commissioner must consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
47. In his application to the Commissioner, Mr Kane pointed to the public interest in knowing what evidence there was to back up public statements made by the Cabinet Secretary on the subject of private contractors and the NHS, during the run-up to the referendum (which Mr Kane describes as one of the most important decisions made in Scotland for hundreds of years).
48. The Ministers commented that they recognise and acknowledge the strong public interest “in the functions of the Scottish Government and the increased public interest both pre and post referendum”. They also acknowledged that disclosing the information would promote openness and transparency, which would be in the public interest.

49. The Ministers recognised some public interest in releasing the information as part of open, transparent and accountable government and to inform public debate and because there is strong public interest in health provision and the NHS in Scotland. However, they believed there was a greater public interest in allowing a private space within which officials can provide full and frank advice to Ministers, as part of the process of ensuring Ministers have up to date information on the spending and pressures in the NHS in Scotland. Officials would not be likely to provide such comprehensive advice in future if they knew it was likely to be released, particularly where they are making their own assessments or interpretations of what Health Board staff have told them. This would lead to Ministers being less aware of what is happening on the ground in the NHS and, consequently, more open to criticism or less able to respond to questions about issues, such as spending on private sector treatment.
50. The Commissioner recognises that disclosure of the information withheld under section 30(b)(i) would increase transparency: release of this information would allow the public to gain a better understanding of the information and advice provided to Ministers on this subject. Mr Kane is correct to point to the public interest in transparency in respect of the NHS, and in particular in respect of NHS spending.
51. However, the Commissioner accepts that if disclosure would inhibit officials from commenting frankly and willingly on such issues, this could diminish the quality of decision making, which would be not be in the public interest.
52. The Commissioner notes that the Ministers have disclosed a large proportion of the information from the documents identified as falling within the scope of Mr Kane's request, and considers that the information disclosed goes some way towards satisfying the relevant public interests in favour of disclosure.
53. On balance, the Commissioner has concluded that, in this instance, the public interest in maintaining the exemption in section 30(b)(i) outweighs that in disclosure of the information to which the exemption has been found to apply. She therefore concludes that the Ministers were entitled to withhold information from document 3 under section 30(b)(i) of FOISA.

## Decision

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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 Kane.

The Commissioner is satisfied that the Ministers located all the information they held which fell within the scope of Mr Kane's request.

She accepts that the Ministers correctly gave notice that they did not hold some information, as required by section 17 of FOISA.

The Commissioner finds that the Ministers were entitled to withhold some information under the exemption in section 30(b)(i) of FOISA, but were wrong to withhold other information under that exemption.

The Commissioner requires the Ministers to provide Mr Kane with the information wrongly withheld from documents 2 and 4 by **14 September 2015**.

## Appeal

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Should either Mr Kane 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**

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If the Scottish 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 it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**28 July 2015**

## 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.

...

- (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.

...

#### 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.

...

#### 30 Prejudice to effective conduct of public affairs

Information is exempt information if its disclosure under this Act-

- (b) would, or would be likely to, inhibit substantially-

...

- (i) the free and frank provision of advice;

....

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