

Decision Notice

Decision 035/2019: Mr Q and the Scottish Ministers

Risk assessments

Reference No: 201802136

Decision Date: 7 March 2019



Scottish Information
Commissioner

Summary

With reference to three loans made to third parties, the Ministers were asked for information relating to specific risk assessments used prior to the provision of the loans.

The Ministers advised that some of the information requested was not held and that the information it did hold was exempt from disclosure.

The Commissioner investigated and found that the Ministers did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 2(1)(b) (Effect of exemptions); 17(1) (Notice that information is not held)

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 18 October 2018, Mr Q made a request for information to the Scottish Ministers (the Ministers). Mr Q referred to three specific loans made by the Ministers and asked for “a copy of the risk assessments used by Scottish Ministers prior to engaging in the transactions to evaluate and mitigate (1) bribery / corruption risks and (2) money-laundering risks”.
2. The Ministers responded on 15 November 2018. They stated that, in relation to one of the loans, they did not hold the information requested as the loan was made by a fund manager, independent of the Ministers. In relation to the other two loans, the Ministers advised that the information was exempt from disclosure under sections 30(c) (Effective conduct of public affairs) and 33(1)(b) (Commercial interests and the economy) of FOISA.
3. On 15 November 2018, Mr Q wrote to the Ministers, requesting a review of their decision on the basis that the public interest favoured disclosure of the information requested.
4. The Ministers notified Mr Q of the outcome of their review on 5 December 2018. This upheld the original response without modifications.
5. On 11 December 2018, Mr Q wrote to the Commissioner’s Office. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Q stated he was dissatisfied with the outcome of the Ministers’ review because the public interest favoured the disclosure of the information requested.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Q 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.

7. On 3 January 2019, the Ministers were notified in writing that Mr Q had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr Q. The Ministers responded and advised that they did not in fact hold any information falling within the scope of Mr Q's request. The case was allocated to an investigating officer.
8. 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, answer specific questions (with reference to the steps they had taken to identify and locate the information requested) and explain why they had relied on section 30(c) and 33(1)(b) of FOISA in responding to Mr Q.
9. The Ministers responded and acknowledged that, at the time they dealt with Mr Q's request, they pre-determined that, if any information falling within the scope of the request was held, it would be exempt from disclosure under sections 30(c) and 33(1)(b) of FOISA. As a result of taking this position, the Ministers explained that no searches were undertaken at the time of Mr Q's request to establish whether information was actually held.
10. The Ministers accepted that this was that this was the wrong approach to take and that, in failing to give Mr Q proper notice under section 17(1) of FOISA, they had failed to comply with Part 1 of FOISA. The Ministers also recognised that when initially assessing a request for information they should identify any information falling within the scope of the request, prior to considering whether any information was exempt from disclosure. The Ministers apologised for this error.
11. The Ministers also explained the steps taken during the investigation to establish whether they held any information falling within the scope of the request.
12. The Ministers also advised that, during the investigation, they provided Mr Q with notice in terms of section 17(1) of FOISA, receipt of which had been acknowledged.

Commissioner's analysis and findings

13. 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 Mr Q and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Information held by the Ministers

14. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority. This is subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. These qualifications do not apply in this case.
15. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
16. 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.

17. In their submissions to the Commissioner, the Ministers explained that there was no reason to believe the assessments in question were required, the risks being considered low. They provided the Commissioner with details of the enquiries they undertook to ascertain what information they held falling within the scope of Mr Q's request, detailing the enquiries undertaken (including the search terms used for searches of electronic records). The Ministers provided supporting evidence confirming the outcomes of their enquiries, explaining the conclusion was that they did not hold any relevant information.
18. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that the Ministers interpreted Mr Q's request reasonably and that (during the investigation) the Ministers took adequate, proportionate steps to establish whether they held any information falling within the scope of the request. Consequently, in regard to this matter, the Commissioner is satisfied (on the balance of probabilities) that the Ministers did not hold any information falling within the scope of Mr Q's request.
19. Given that the Commissioner accepts that the Ministers did not hold any information falling within the scope of the request, they had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.
20. By failing to give Mr Q notice under section 17(1) that it did not hold the information, to which it had initially applied sections 30(c) and 33(1)(b) of FOISA, the Commissioner must find that the Ministers failed to comply with Part 1 (and, in particular, section 17(1)) of FOISA in responding to Mr Q's request.
21. The Commissioner notes that the Ministers wrote to Mr Q during the investigation and apologised for any previous error, confirming that no information was held. In the circumstances, he does not require the Ministers to take any action.
22. The Commissioner is concerned, however, that it appears to have taken the Ministers until an application was made to the Commissioner before they took the appropriate steps to determine whether they held the requested information. While no useful purpose would be served by requiring the Ministers to take any specific action in this case, the Commissioner would urge them to ensure that, in response to future information requests, they take reasonable steps to establish whether they actually hold any relevant information before purporting to withhold that information from requesters.

Decision

The Commissioner finds that the Scottish Ministers failed to comply with Part 1 (specifically section 17(1)) of the Freedom of Information (Scotland) Act 2002, by not providing Mr Q with a notice that they did not hold the information requested.

Appeal

Should either Mr Q 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.

Margaret Keyse
Head of Enforcement

7 March 2019

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.

...

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.

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