



Scottish Information
Commissioner
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Decision Notice 186/2024

Special Adviser's email correspondence

Authority: Scottish Ministers

Case Ref: 202301071

Summary

The Applicant asked the Authority for email correspondence sent to and from Special Advisers. The Authority disclosed some information but it withheld other information arguing that disclosure would substantially prejudice its ability to carry out preparatory work for parliamentary questions. The Authority also notified the Applicant that it did not hold information relating to one named Special Adviser.

The Commissioner investigated and found that the Authority did hold information relating to the named Special Advisor, and that it also held other information that fell within scope of the request. In relation to the information that the Authority had located, and was withholding under an exemption, the Commissioner found that the exemption did not apply.

The Commissioner required the Authority to disclose the information it had wrongly withheld and to carry out new searches and issue a fresh review outcome to the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) (Information not held); section 30(c) (Prejudice to the effective conduct of public affairs); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 30 December 2021, the Applicant made a request for information to the Authority. He asked for all emails sent to, and sent by;
 - (i) a named senior Special Advisor, and
 - (ii) all Government Special Advisers (who were employed in their role at the time)on 5, 6 and 7th February 2020.
2. The Authority wrote to the Applicant on 28 January 2022, explaining that its records management policy meant that it did not hold emails from that far back within its email system, therefore a search of the corporate record was required. The Authority stated that the cost of locating, retrieving and providing the information requested would exceed the upper cost limit of £600 and, consequently, it refused to comply with the request in terms of section 12(1) of FOISA. The Authority provided the Applicant with advice on how to narrow the scope of his request (e.g. by specifying a subject matter) to help bring it within the cost limit.
3. On 28 January 2022, the Applicant asked the Authority for a review of its decision. The Applicant stated that he was dissatisfied with its response because in his view, the Authority should be able to locate and retrieve the emails.
4. The Authority notified the Applicant of the outcome of its review on 24 February 2022, upholding its original view that section 12(1) applied. The Applicant subsequently applied to the Commissioner who challenged the Authority's reliance on section 12(1) of FOISA, as a result of which, the Authority amended its position.
5. The Authority issued the Applicant with a revised review outcome on 31 July 2023. In this revised review, the Authority stated it was no longer relying on section 12(1) of FOISA. For part (i) of the request, the Authority gave notice under section 17(1) of FOISA that no information was held. In relation to part (ii) of the request, the Authority stated that it had found one email within scope, which was disclosed with some information redacted under section 30(c) and section 38(1)(b) of FOISA.
6. The Applicant withdrew his original application to the Commissioner, and on 11 August 2023, the Applicant made a new application to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. In this email, and in further correspondence on 4 September 2023, the Applicant set out his dissatisfaction with the Authority's revised review outcome. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he did not believe that the Authority held no information in relation to part (i) of his request. The Applicant also challenged the Authority's reliance on section 30(c) to withhold information in part (ii) of his request. The Applicant did not challenge the Authority's reliance on section 38(1)(b) of FOISA.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. On 29 August 2023, the Authority was 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 Authority was invited to comment on this application and to answer specific questions relating to the searches it had carried out and its use of exemptions under FOISA. The Authority was also asked to provide the Commissioner with the information it was withholding from the Applicant.

Commissioner's analysis and findings

10. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 1(1) – General entitlement

11. 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, 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. The qualifications in section 1(6) are not applicable in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4). If no relevant information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
13. 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 lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

Searches

14. In his request, the Applicant asked for all emails sent to, and from all government Special Advisers (including one named individual) on 5, 6, and 7 February 2020. In relation to part (i) of the request (the named individual), the Authority gave the Applicant notice under section 17(1) of FOISA that it did not hold any information.
15. In its submissions, the Authority explained that Special Advisers are civil servants on fixed term appointments and, as part of their contractual arrangements, they do not have access to its electronic record management system (eRDM). The Authority stated that, in relation to the information covered by the request (emails sent to or from Special Advisers), officials were responsible for recording any government business contained within those emails to the eRDM. The Authority also stated that no emails are retained or held in inboxes beyond 3 months.
16. The Authority conceded that it had not retained a record of the searches carried out at the time of the request, or the review, and it explained that it had carried out new searches following notification that an application had been received by the Commissioner.

17. The Authority explained that it carried out searches of the eRDM by “creation date” (for each date stated in the request) and by searching text for the names and email addresses of each Special Adviser. The Authority submitted that these searches returned no results for part (i) of the request and only one result for part (ii) of the request.
18. During the investigation, the Authority was asked to carry out further searches using additional search functionality within the eRDM; functionality that the Authority claimed it was unaware of at the time of the request, and as a result of these new searches, it identified some information falling within the scope of part (i) of the request, and further information falling within the scope of part (ii) of the request.

The Commissioner’s view

19. The Commissioner has concerns about the Authority’s handling of this request and its engagement with his office in this particular case. He notes that the Authority originally mishandled the Applicant’s request by refusing the request under section 12(1) of FOISA, claiming that compliance with the request would exceed £600, and when it did provide the Applicant with a new review outcome, it only identified one document falling within the scope of part (ii) of the request, and it claimed that no information was held in relation to part (i) of the request. Further searches revealed that significantly more information was held by the Authority, and therefore neither of the two review outcomes it provided to the Applicant were correct.
20. The Commissioner notes that there does not appear to have been any record keeping in relation to any of the searches carried out by the Authority. The Commissioner would like to refer the Authority to paragraph 6.2.3 of the [Scottish Ministers’ Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information \(Scotland\) Act 2002 and the Environmental Information \(Scotland\) Regulations 2004](#)¹ (the Section 60 Code), which emphasises the value of keeping records of searches, in particular as evidence for reviewers and, in the event of an appeal, as evidence for the Commissioner. Had the Authority followed the advice provided in the Section 60 Code, it would not have experienced the problems it has claimed.
21. The Commissioner is further concerned by the Authority’s poor operational awareness of its eRDM system and its apparent inability to carry out adequate searches of that system. The Authority had to be prompted following extensive correspondence within this office, to carry out searches using narrowed searched terms. The Commissioner finds this totally unacceptable. The Authority must ensure that it understands its own records management systems and how to locate and retrieve information held in those systems.
22. As the Authority identified information falling within the scope of part (i) of the request, and further information falling within the scope of part (ii) of the request during the investigation, there can be no doubt that the Authority failed to locate, retrieve and consider all the information it held at the time of the request. The Commissioner must therefore find that the Authority failed to comply with section 1(1) of FOISA, when it responded to the Applicant’s request and requirement for review.
23. He will now go on to consider the single document that the Authority is withholding under section 30(c) of FOISA.

¹ <https://www.gov.scot/publications/foi-eir-section-60-code-of-practice/>

Section 30(c) – Prejudice to effective conduct of public affairs

24. Section 30(c) of FOISA exempts information if its disclosure "would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs". The use of the word "otherwise" distinguishes the harm required from that envisaged by the exemptions in sections 30(a) and (b). This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information, and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
25. The standard to be met in applying the tests contained in section 30(c) is high: the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future, not simply that such prejudice is a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances (which may include the timing of the request).

The Authority's submissions

26. The Authority submitted that the withheld information (an email) relates to the preparation for oral Parliamentary Questions, and disclosure would substantially prejudice the effective operation of that process. It stated that this is the substantial prejudice to the effective conduct of public affairs for the purposes of the exemption.
27. The Authority submitted that preparation for oral Parliamentary Questions' is a process which allows Ministers to offer the best response possible to questions being asked. In this instance, the withheld information revealed how Ministers were offered insight from Special Advisers on possible supplementary questions and extends beyond advice and views. The Authority explained that it was not possible to predict accurately what opposition parties will ask as follow up questions. It noted that the withheld information is supplementary questions that will be posed by the SNP MSP's and subsequent political advice from the special advisors.
28. The Authority argued that if this process was made public, it would indicate an element of duplicity in that questions in chambers are not "live". It submitted that ensuring that Ministers were prepared and able to respond appropriately was an essential part of the parliamentary question process, and disclosure would substantially prejudice and undermine the effective conduct of public affairs.
29. The Authority stressed that it was important that Ministers were allowed to prepare and respond to rightful challenge of the opposition without fear of the opposition or the public becoming aware. If this occurred, it argued that it would have a detrimental impact on its ability to robustly defend the position of the Scottish Government.
30. The Authority submitted that while it was not possible for it to predict what questions will be posed in the future, many of the anticipated/suggested supplementary questions, and their suggested responses, will be reused.

The Commissioner's view

31. In coming to a decision on the application of section 30(c) of FOISA, the Commissioner has considered all of the submissions made by the Authority.

32. In its reasoning submitted to the Commissioner, the Authority suggested that the wider public may be unaware of the process of preparation for parliamentary questions, and that questions and answers are rehearsed in advance of the live event in chambers. The Commissioner is however, not persuaded by this argument. He notes that Rule 13.6 of the published [Standing Orders of the Scottish Parliament](#)² makes it clear that questions for oral answers may be lodged in advance. Indeed, he considers it to be widely known by the public that oral questions are prepared for and rehearsed in advance.
33. In considering the withheld information, the Commissioner has reviewed the [Official Parliamentary Record](#)³ for the oral question session that it relates to. A significant amount of the withheld information, those questions which were asked on that day, was published prior to the Applicant making his information request. He acknowledges that there are some advance questions, contained in the withheld information, that were not asked on that day. However, the Commissioner does not consider the information itself to be sensitive. Moreover, it relates to matters and questions that were being considered almost two years prior to the date of the request.
34. The Commissioner has also considered whether the process of preparing for parliamentary questions is a confidential or sensitive process. He accepts that the Authority, its officials and advisers, need a space in which to discuss and debate matters as part of this process, and that these aspects of the process could be considered confidential or sensitive. However, he does not view the withheld information in those terms. It is simply an advance list of potential questions, including follow up or supplementary questions. The Commissioner acknowledges that these additional questions may have been put forward by the special advisor, to challenge the specific Minister in order that they are fully prepared, but he does not consider that they have the sensitivity claimed by the Authority. There are no answers in the document, only questions.
35. In all the circumstances, the Commissioner is not satisfied that disclosure of the withheld information would prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.
36. As the Commissioner is not satisfied that the information was withheld correctly under section 30(c) of FOISA, he is not required to go on to consider the public interest test in section 2(1)(b) of FOISA.

Decision

The Commissioner finds that the Authority 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 failing to identify and locate all of the information that fell within the scope of the request, the Authority failed to comply with section 1(1) of FOISA.

² <https://www.parliament.scot/about/how-parliament-works/parliament-rules-and-guidance/standing-orders/chapter-13-statements-and-parliamentary-questions>

³ <https://www.parliament.scot/chamber-and-committees/official-report/search-what-was-said-in-parliament/meeting-of-parliament-06-02-2020?meeting=12507&iob=113050>

Furthermore, the Authority was not entitled to notify the Applicant, under section 17(1) of FOISA, that information was not held for part (i) of the request.

The Commissioner also finds that the Authority was not entitled to withhold information in relation to part (ii) of the request, under section 30(c) of FOISA.

The Commissioner now requires the Authority to provide the Applicant with the information it wrongly withheld under section 30(c) of FOISA, and to ensure that it has carried out fully adequate searches for the information requested by the Applicant and then to issue a new review outcome to the Applicant, either disclosing any further information identified and located or notifying the Applicant why the information cannot be provided under a provision in Part 1 or 2 of FOISA.

The Authority must carry out these steps and notify the Applicant of the outcome of its review, by **18 October 2024**.

Appeal

Should either the Applicant or the Authority 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

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

David Hamilton
Scottish Information Commissioner

03 September 2024