Scottish Information Commissioner

Our Ref: 202400275

Mr John Paul Marks
Permanent Secretary
Scottish Government

By email: PermanentSecretary@gov.scot

12 December 2024

Dear Permanent Secretary,

Government Response to Scottish Information Commissioner Decision 193/2024

I write having now considered the material released by Scottish Government in compliance with Decision 193/2024.

Due to the live nature of related appeals being considered by my office, I cannot engage in any legal discussion on this matter. Nevertheless, I do want to express my disappointment in the way that elements of this case have been handled.

My concerns fall into the following categories:

- The Ministers' failure to withdraw the Court of Session appeal once it was clear there were limited prospects of success and the associated impact on public funds
- Delay to Request
- The misrepresentation of position in related media statements
- The quality of original submissions

Failure to withdraw and impact on public funds

The evidence from Counsel Opinion shows that from **22 May 2023**, the Ministers were advised that the chances of success at the Court of Session were substantially diminished:

"While the Commissioner's reasoning is open to criticism for the reasons set out in senior counsel's previous opinions, we consider that the court is likely to take a broad approach on appeal. If it does so, we consider that on balance the court is more likely than not to refuse the appeal and thus to leave the information request to be determined by reference to the various exemptions that may apply"

David Hamilton, Scottish Information Commissioner
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It is clearly disappointing that despite this clear advice, the Ministers continued with the Hearing on 6 December 2023, with all the associated significant resource and cost impact for both your organisation and mine.

Delay to the requester

The Ministers' right of appeal to the Court of Session is a fundamental aspect of a democratic society. But where, as in this case, the chances of success are suitably diminished, it could be argued that any additional delay was deliberate, to frustrate the rights of the requester. This is particularly relevant given the context of this case, where the application of exemptions to the information requested was still an option available to the Ministers.

I would also ask you to reflect on whether compliance with the decision really had to wait until the morning of Saturday 26 October 2024. I fully respect the Ministers' right to give due consideration whether to appeal to the Court of Session, but – assuming that was not still in contemplation – surely it would have been in line with the spirit of the legislation (and, in particular, the rights of the requester) to secure compliance as quickly as possible.

Misrepresentation

As regulator for Freedom of Information (FOI), I was deeply disappointed in the tone of the media statement accompanying the disclosure, which, in my view, misrepresented the facts as disclosed in the information. The statement suggested that the Ministers had a stateable case throughout the timeline of appeal. As highlighted above, this is not a true or transparent reflection of advice received. Ministers' chances of success diminished considerably over time and attempts to present this otherwise are not what I would expect from a Public Authority.

Quality of original submissions

From a review of the information disclosed it is evident that, in relation to the accessibility of information, there were some factual discrepancies between the original submissions received by my office and the position as later ascertained by the Ministers. Had more care been taken in compiling arguments when my office sought submissions, a failed appeal to the Court of Session, delay to the requester and the significant impact on the public purse may have been avoided.

Despite the concerns that have been highlighted in the handling of this case, it would be remiss of me not to note that the way in which this and some related cases are handled is out of character with the rest of the Scottish Governments FOI performance. The Scottish Government is performing remarkably well from a quantitative perspective, and I hope that next month our quality review will take me to a point where I can close my long running intervention.

Yours sincerely

David Hamilton
Scottish Information Commissioner

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