



Scottish Information
Commissioner
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Decision Notice 144/2025

James Hamilton's investigation into the First Minister under the Ministerial Code

Authority: Scottish Ministers
Case Ref: 202400547

Summary

The Applicant asked the Authority for information relating to James Hamilton's investigation into the First Minister under the Ministerial Code. The Authority informed the Applicant that it did not hold the information requested relating to notes made by Mr Hamilton and it withheld the name of the civil servant who directed or oversaw the redactions on the basis it was third party personal data. During the investigation, the Authority changed position and identified three individuals who directed or oversaw the redactions and disclosed their details to the Applicant. The Commissioner investigated and found that the Authority did not hold the information requested relating to notes made by Mr Hamilton, but that it had failed to comply with FOISA in responding to the part of the request relating to redactions.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 47(1) and (2) (Application for decision by Commissioner).

Background

1. On 24 January 2024, the Applicant made a request for information to the Authority. Among other things, he asked:

- (i) “Does the [Authority] hold following the ruling from the inner house in December 2023 that it holds all evidence gathered in the investigation hold any notes made by Mr Hamilton himself during his investigation. If so, how many notes/number of pages of notes do they hold.”
 - (ii) “Who within the [Authority] directed/oversaw the redactions made to Mr Hamilton's final published report?”
2. The Authority responded on 21 February 2024 in the following terms:
 - regarding part (i) of the request, the Authority explained it had interpreted this part of this request as being for notes made by Mr Hamilton himself during his investigation. It issued the Applicant with a notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.
 - regarding part (ii) of the request, the Authority informed the Applicant that a civil servant within the Authority's Organisational Continuity Team oversaw the redactions made to Mr Hamilton's final published report. It withheld the name of the civil servant under the exemption in section 38(1)(b) of FOISA.
3. On 22 February 2024, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision for the following reasons:
 - regarding part (i) of his request, he considered it extremely unlikely that Mr Hamilton would not have taken notes. He asked whether the Authority was claiming it did not “hold” these notes for the purposes of FOISA – a position it had adopted in relation to a previous request for related information. (This request was considered in [Decision 004/2023](#)¹.)
 - regarding part (ii) of his request, he considered the exemption in section 38(1)(b) of FOISA had been wrongly applied to withhold the name of the civil servant.
4. The Authority notified the Applicant of the outcome of its review on 15 March 2024, which fully upheld its original decision.
5. On 16 April 2024, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. He stated that he was dissatisfied with the outcome of the Authority's review for the reasons set out in his requirement for review. He also argued that it was in the public interest to understand who directed or oversaw the redactions to Mr Hamilton's final published report.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
7. On 19 April 2024, the Authority was notified in writing that the Applicant had made a valid application. The Authority was asked to send the Commissioner the information withheld from the Applicant. The Authority provided the information, and the case was allocated to an investigating officer.

¹ <https://www.foi.scot/decision-0042023>

8. 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.

Commissioner's analysis and findings

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

Part (i) of the request

10. 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 are not applicable to this case.
11. The information that is 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 the information an applicant believes an authority should hold. 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.
12. 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.
13. The Commissioner 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.

The Applicant's submissions

14. The Applicant explained that he was "genuinely unsure" what the Authority was saying in its response to this part of this request. He asked whether it was stating that Mr Hamilton created no notes, or that it legally did not "hold" these notes. If the former, he said he would simply like the Authority to state this (though he would find it extremely unlikely that the Authority did not hold this information). If the latter, he considered the Authority's position was not in line with the Court of Session's judgment [in Scottish Ministers v Scottish Information Commissioner \[2023\] CSIH 46](https://www.scotcourts.gov.uk/media/wzclsnew/court-of-session-judgement-the-scottish-ministers-against-the-scottish-information-commissioner-06-december-2023.pdf)².

The Authority's submissions

15. The Authority explained that, in a response to a subsequent request for information from the Applicant, it had clarified its position in relation to the concerns expressed by the Applicant at paragraph 14. It said:

"For the avoidance of doubt, we cannot confirm under FOISA whether notes were created as this information is not recorded but we can confirm, as we have in our previous responses to

² <https://www.scotcourts.gov.uk/media/wzclsnew/court-of-session-judgement-the-scottish-ministers-against-the-scottish-information-commissioner-06-december-2023.pdf>

you in this topic, that at the time of your request, neither the [Authority] nor Mr Hamilton on behalf of the [Authority] held any such notes.”

16. The Authority stated that it had previously contacted Mr Hamilton and he had confirmed that he held no further material. It did not deem it appropriate to contact Mr Hamilton again to ask him the same question when he has already provided a “definitive” response. It provided the Commissioner with a copy of Mr Hamilton’s previous response.
17. The Authority confirmed that, if Mr Hamilton did hold the information requested, it would consider he held it on behalf of the Authority in terms of section 3(2)(b) of FOISA.
18. The Authority explained that all documents relating to the “James Hamilton Review” (the Review) that were held by the Secretariat on behalf of Mr Hamilton were transferred to the Authority’s Propriety and Ethics Team on 21 December 2023, following the decision by the Authority on 20 December 2023 not to appeal the Court of Session’s judgment to the Supreme Court. As noted above, Mr Hamilton had confirmed that he did not hold any additional information to that held by the Secretariat.
19. The Authority stated that all documents relating to the Review were stored centrally within a single folder set up for this purpose. It carried out a search of the folder using the keyword “note”, which returned no results for notes created by Mr Hamilton. It explained there were no pdfs of handwritten notes in the file, with the only documents referring to notes being a covering letter to the Deputy First Minister (which was published with the report), fee notes, a note from Mr Alex Salmond’s Counsel and links to transcripts of meetings created by the Secretariat and sent to a named interviewee for comment.
20. For completeness, the Authority asked the Secretariat for the Review whether any notes were transmitted from Mr Hamilton. The Secretariat confirmed that they did not receive any notes of meetings, interviews, handwritten notes, WhatsApp messages or notes of any other kind from Mr Hamilton to save to the folder for the Review. The Commissioner is however aware of a subsequent FOI request in which WhatsApp messages between Mr Hamilton and his Secretariat were found by the Authority (and subsequently released to the requestor). The Authority’s submission that it did not hold WhatsApp messages will therefore be considered as part of the Commissioners ongoing intervention. The message contents are however not directly pertinent to this appeal.
21. The Authority explained that all matters relating to the investigation were for Mr Hamilton to decide on. Having created his report, all relevant information was stored in the folder for the Review. It stated that it did not expect notes (if taken) which did not “reflect the final product” to have been retained.
22. In response to further questions from the Commissioner regarding notes Mr Hamilton might have created during the Review, the Authority contacted Mr Hamilton to put these questions to him.
23. Mr Hamilton explained that he did not take any notes during interviews for the “purpose of making a record” and instead relied on the Secretariat for the Review to keep records of anything that needed to be recorded. Mr Hamilton confirmed that all correspondence he had in connection with the Review was either conducted by the Secretariat for the Review or copied to them.
24. Mr Hamilton acknowledged that he may have made informal handwritten notes at times to remind himself of some matter, but any such notes would invariably have been very brief.

Once used, these notes would be disposed of – he did not retain any and it had never been his practice to do so. Mr Hamilton also confirmed that he drafted his report on his computer and that he deleted any unwanted or unused material on an ongoing basis.

The Commissioner's view

25. Having considered all relevant submissions and the terms of the request, the Commissioner is broadly satisfied that the Authority took adequate and proportionate steps to establish whether it held any recorded information that fell within the scope of part (i) of the Applicant's request.
26. In the circumstances, the Commissioner accepts that the Authority has provided a reasonable explanation of why it does not hold the information requested. He also considers that the Authority's searches were reasonable and would be capable of locating the information requested if it was held.
27. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied, on balance, that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide – his remit is limited to establishing the extent to which the information actually requested is held (if at all).
28. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the information requested in part (i) of his request.

Part (ii) of the request

29. The Authority advised the Applicant, in its initial response and review outcome, that a civil servant within the Organisational Continuity Team oversaw the redactions made to Mr Hamilton's final published report. It withheld the name of the civil servant under the exemption in section 38(1)(b) of FOISA.
30. During the investigation, the Authority identified four individuals involved in directing or overseeing the redactions to Mr Hamilton's final published report. It explained that these individuals had been seconded to the Hamilton Review secretariat for a short time to consider what redactions would be required to comply with various court orders. It withheld the names of these individuals under the exemption in section 38(1)(b) of FOISA.
31. In response to questions from the Commissioner, the Authority reconsidered its position in relation to this part of the Applicant's request. It explained that the four individuals whose names it had withheld under the exemption in section 38(1)(b) of FOISA were in fact the individuals who carried out the redactions, not those who directed or oversaw the redactions. It identified three named individuals who directed or oversaw the redactions, and, given their seniority, it disclosed their details in full to the Applicant.
32. Following receipt of this information, the Applicant informed the Commissioner that he believed a named Special Adviser had been involved in directing or overseeing the redactions. The named Special Adviser was not one of the three named individuals (none of whom were Special Advisers) whose details were disclosed by the Authority.
33. The Commissioner asked the Authority to respond to this point. The Authority confirmed that the named Special Adviser "had no role and no involvement in the redaction process for the James Hamilton report".

34. During the investigation, the Commissioner became aware of information in the public domain that contradicted the Authority's above position. In particular, Rt Hon David Davis MP made a [speech to Parliament](#)³ in which he stated:
- "I have heard evidence that special advisers—not lawyers—appointed by Nicola Sturgeon had been directly involved in the redactions of Mr Hamilton's report. I have pursued this point with the current permanent secretary, but I have not received a satisfactory or clear reply."
35. The Commissioner followed a line of enquiry in an attempt to reconcile the discrepancy between the two narratives, but exhausted this without conclusion.
36. For thoroughness, and to eliminate any need for any investigation of the Authority under section 65 of FOISA, the Authority was invited to assist the Commissioner by requesting a voluntary affidavit from the named Special Adviser. It was requested that this clarify the named Special Adviser's role in the redaction process. This invitation to provide an affidavit was refused and instead a signed statement was provided. The Commissioner draws no negative inference from non-compliance with this request.
37. Having considered all the information available to him, the Commissioner does not consider there to be evidence of criminality by the Authority.
38. The Commissioner must further accept that, on the balance of probabilities, the Authority's position that the named Special Adviser was not involved in the redaction process is sustainable.
39. While the Commissioner is satisfied, on balance, that the Authority has now disclosed the details of the individuals involved in directing or overseeing the redactions, he must find that the Authority failed to comply with Part 1 of FOISA by initially failing to accurately interpret this part of the Applicant's request and by failing to disclose information falling within the scope of this part of the request until during the investigation.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that by correctly applying section 17(1) of FOISA to part (i) of the Applicant's request, the Authority complied with Part 1.

However, by failing to accurately interpret part (ii) of the Applicant's request and by failing to disclose information falling within the scope of this part of the request until during the investigation, the Authority failed to comply with section 1(1) of FOISA.

Given that the Authority has now disclosed to the Applicant the information falling within the scope of part (ii) of his request, the Commissioner does not require the Authority to take any action in respect of this failure in response to the Applicant's application.

³ <https://hansard.parliament.uk/Commons/2024-07-18/debates/4DC08467-BEE4-414B-B9F5-D99EB190B0AA/details#contribution-AFB8C127-26C0-4301-BA0C-0EE57F1CDCE1>

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.

David Hamilton

Scottish Information Commissioner

12 June 2025