



Scottish Information
Commissioner
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Decision Notice 225/2026

Communications and transcripts relating to the James Hamilton Report

Authority: Scottish Ministers
Case Ref: 202502069

Summary

The Applicant asked the Authority for information relating to specific communications to or from James Hamilton regarding the outcome of his investigation into the then First Minister under the Ministerial Code and for a transcript of all phone conversations between James Hamilton and his Secretariat referenced in response to a previous information request. The Authority informed the Applicant that it did not hold the information requested. The Commissioner investigated and found that the Authority did not hold the information requested.

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 1 September 2025, the Applicant made a request for information to the Authority. He asked for:

- (i) All communications between/from/to Mr Hamilton and individuals regarding the following WhatsApp passage (contained in information disclosed by the Authority in [response to a previous FOI request](#)¹):

Mr Hamilton: "... But I have been very encouraged by a large number of people who have contacted me to say how pleased they were with the outcome."
 - (ii) Regarding part (i), were any of these individuals members of the Scottish Government?
 - (iii) All transcripts of all the phone conversations between Mr Hamilton and his Secretariat referenced in the Authority's response to a previous FOI request (referred to in part (i))."
2. The Authority responded on 29 September 2025. It issued the Applicant with a notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.
 3. On 30 September 2025, the Applicant wrote to the Authority requesting a review of its decision. He stated that he was dissatisfied with the decision because he believed that the Authority held the information requested and explained why.
 4. The Authority notified the Applicant of the outcome of its review on 28 October 2025, which upheld its original decision.
 5. On 17 November 2026, 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 because he believed that the Authority held the information requested.

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 6 February 2026, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently 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 Authority was invited to comment on this application and to answer specific questions related to how it established that it did not hold the information requested.

Commissioner's analysis and findings

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

¹ <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2025/07-e/foi-202500464648/documents/foi-202500464648---information-released---annex-a/foi-202500464648---information-released---annex-a/govscot%3Adocument/FOI%2B202500464648%2B-%2BInformation%2Breleased%2B-%2BAnnex%2BA.pdf>

Section 17(1) – Notice that information is not held

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, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) of FOISA are not applicable in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. 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 it to give the applicant notice in writing 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 lies, the Commissioner must first of all consider the interpretation and scope of the request and thereafter the 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. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is actually held by the public authority (or was, at the time it received the request).

The Applicant's submissions

14. In relation to parts (i) and (ii) of the request, the Applicant commented that the [Opinion of the Court of Session](https://www.scotcourts.gov.uk/media/wzclsnew/court-of-session-judgement-the-scottish-ministers-against-the-scottish-information-commissioner-06-december-2023.pdf)² in December 2023 had found that Mr Hamilton and the process he undertook was an "internally-government devised process" and therefore subject to FOI requests. He noted that WhatsApp communications between Mr Hamilton and his Secretariat had already been made public in response to a previous FOI request.
15. The Applicant observed that Mr Hamilton had stated that he had been "contacted" by a "large number of people". He submitted that this contact was made when Mr Hamilton was in his role as an Independent Adviser on the Ministerial Code and that Mr Hamilton had sent the WhatsApp message referred to in part (i) of the request the day after the report was published.
16. The Applicant therefore did not consider it credible that the Authority did not hold the information requested. He argued that any communications related to Mr Hamilton's role as an Independent Adviser were "clearly FOI-able", as established by the Court of Session, and that these communications were clearly related to Mr Hamilton's functions as an Independent Adviser.
17. The Applicant also commented that the Authority clearly had access to employee devices, emails and phones, so he did not see how the Authority could issue him with a notice, in terms of section 17(1) of FOISA, in response to part (ii) of his request. He considered that Authority employees either did contact Mr Hamilton to say how pleased they were with the outcome of the report or they did not.

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

18. In relation to part (iii) of the request, the Applicant stated that he found it “remarkable” that there existed no written records or transcripts of phone calls between Mr Hamilton and his Secretariat. He noted that this was one of the most high-profile investigations in recent Scottish political history and that the absence of such records was, in his view, “unlikely”.

The Authority’s submissions

19. In relation to parts (i) and (ii) of the request, the Authority explained that it contacted Mr Hamilton in October 2025 after receiving the Applicant’s requirement for review. It asked Mr Hamilton to search for any communications from people who contacted him regarding the outcome of his report. The Authority provided a copy of Mr Hamilton’s response to the Commissioner.
20. Mr Hamilton stated that, following the publication of the report, he received no communication from any person who was a witness in his inquiry or connected with it in any way, other than a telephone call from the then Deputy First Minister (DFM), John Swinney, to thank him for his work. To the best of his recollection, Mr Hamilton said that the then DFM made no comment to him concerning the substance of the report.
21. Mr Hamilton also confirmed that he held three personal emails from “old friends” who expressed favourable opinions concerning the report. However, he stated that none of these correspondents had at any time during the inquiry discussed any matter connected with the inquiry with him or been involved with the inquiry in any way. He confirmed that he had no record of any conversations he may have had with anybody else at the time, though he commented that he was sure there were some as the case was widely reported on and discussed in the media.
22. The Authority submitted that the three emails held by Mr Hamilton were not, and never had been, held by the Authority.
23. The Authority explained that it was in the [public domain](#)³, via information required to be disclosed in response to [Decision 281/2025](#)⁴, that a phone call was arranged between the then DFM and Mr Hamilton on 22 March 2021. However, it did not consider this information fell within the scope of the request given the description Mr Hamilton provided of the phone call (i.e. that the then DFM made no comment regarding the substance of the report).
24. In relation to part (iii) of the request, the Authority explained that the transcripts referenced in the WhatsApp messages were not in relation to communications solely between Mr Hamilton and his Secretariat. Rather, they referenced the transcripts of interviews undertaken by Mr Hamilton in the course of his investigation.
25. The Authority confirmed that transcripts were not made of phone calls “purely between Mr Hamilton and his Secretariat” and that it was not standard practice for these types of routine administrative phone calls to be recorded or transcribed.

³ <https://www.gov.scot/binaries/content/documents/govscot/publications/foi-eir-release/2026/02-a/foi-202400438168-appeal/documents/foi-202400438168---dn281---information-released---batch-16/foi-202400438168---dn281---information-released---batch-16/govscot%3Adocument/FOI%2B202400438168%2B-%2BDN281%2B-%2BInformation%2BReleased%2B-%2BBatch%2B16.pdf> (pages 266-268)

⁴ <https://www.foi.scot/decision-2812025>

26. The Authority noted that its Records Management Policy sets out the requirements for the management of official information. Regarding minuting of business meetings, the Policy requires business areas to consider the appropriate recording and minuting of meetings:

“Business areas and individual Chairs and Secretariats have a responsibility to consider the appropriate recording and minuting of business meetings and committing them to the corporate record”.
27. The Authority considered that the Policy made it clear that it was for business areas to determine the appropriate recording and minuting of business meetings.
28. The Authority explained that the role of the Secretariat was to support Mr Hamilton in the conduct of his report. They were in regular contact in relation to the administration of the report, primarily by email as well as by phone and video call. These routine phone and video calls were not recorded or transcribed, which it considered reflected standard practice for routine day-to-day administrative matters.
29. By contrast, the Authority noted that meetings between Mr Hamilton and those who provided evidence to his report were transcribed and held as part of the official corporate record in eRDM. Again, it considered that this reflected standard practice whereby meetings that related to decisions or which concerned substantive matters likely to hold corporate value, were recorded appropriately.
30. In terms of searches undertaken in response to the Applicant’s request as a whole, the Authority explained that all material relating to the Hamilton report was held on its corporate record system (eRDM) in a single file. It searched this file and identified no information falling within the scope of the request.
31. The Authority contacted Mr Hamilton’s Secretariat to ask them to confirm whether the calls solely between the Secretariat and Mr Hamilton were recorded. The Secretariat confirmed that they were not.
32. As stated above, the Authority also contacted Mr Hamilton to ask that he search for, and provide, any communications from people who contacted him regarding the outcome of his report. Mr Hamilton’s response is summarised above.
33. In summary, the Authority maintained that it did not hold the information requested and that it was correct to issue the Applicant with a notice, in terms of section 17(1) of FOISA, to that effect.

The Commissioner’s view

34. The Commissioner has taken account of all the relevant submissions provided by both the Applicant and the Authority.
35. The Commissioner accepts, based on the submissions provided by Mr Hamilton, that the emails sent to him by “old friends” were received by him in a personal capacity. The Commissioner also accepts that, at the time the request was received, these emails were the only communications Mr Hamilton personally held that potentially matched the description of the information sought in part (i) of the request.
36. Having fully considered the terms of [Decision 004/2023](https://www.foi.scot/decision-0042023)⁵ and the resulting Opinion of the Court of Session (as referred to by the Applicant), the Commissioner sees no real basis for

⁵ <https://www.foi.scot/decision-0042023>

treating these emails as being held by Mr Hamilton on behalf of the Authority in terms of section 3(2)(b) of FOISA.

37. During the investigation, the Commissioner asked the Authority to confirm whether it held a transcript of the telephone call between the then DFM and Mr Hamilton and, if so, to provide him with a copy. The Authority confirmed that it did not hold a transcript of the telephone call. The Commissioner accepts that the Authority does not hold a transcript of the telephone call.
38. Insofar as Mr Hamilton personally held, at the time the request was received, information of potential relevance to part (i) of the request (i.e. the emails from “old friends”), the Commissioner is satisfied that this is not information that evidences contact from the Authority to Mr Hamilton matching that description. In that context, the Commissioner acknowledges Mr Hamilton’s recollection that the purpose of the then DFM’s telephone call was simply to thank him for his work on the inquiry.
39. The Commissioner notes that Mr Hamilton acknowledged that he may have had other conversations following the publication of the report, but that he no longer had any record of these. However, as stated above, Mr Hamilton was clear that he received no communication from any person connected in any way with his inquiry beyond the telephone call from the then DFM.
40. Insofar as these other conversations might have once existed as recorded information, the Commissioner accepts, given the nature of the WhatsApp message that framed part (i) of the request and the other submissions provided by Mr Hamilton, that there would also be no real basis for treating these conversations as being held by Mr Hamilton on behalf of the Authority in terms of section 3(2)(b) of FOISA.
41. Based on the submissions received from the Authority, the Commissioner also accepts that the Authority does not hold transcripts of the telephone conversations between Mr Hamilton and his Secretariat. However, he notes that the Records Management Policy referred to by the Authority postdates the events in question.
42. Given the explanations and submissions provided, the Commissioner considers that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied that it does not (and did not, on receipt of the request) hold the information requested by the Applicant in parts (i) to (iii) of his request.
43. Having considered the submissions provided, and having taken account of the reasons why the information was not (and is not) held, the Commissioner is satisfied that the Authority does not (and did not, on receipt of the request) hold the information requested by the Applicant in parts (i) to (iii) of his request.
44. While the Applicant believed and expected the specified information to be held by the Authority (not unreasonably in all the circumstances, bearing in mind his previous dealings with the Authority on this and related matters), the Commissioner is satisfied, on balance, that this was not the case. He has no locus, in this context, to determine what information an authority ought to record, or how: he is concerned with what information the authority actually holds.
45. In all the circumstances, the Commissioner 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.

Decision

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

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
8 September 2026