

Decision Notice



Decision 100/2013 Mr Alistair Sloan and the Scottish Ministers

Refusal to confirm or deny whether information is held

Reference No: 201200700
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Summary

On 16 January 2012, Mr Sloan asked the Scottish Ministers (the Ministers) to provide him with a list of solicitors, solicitor advocates, members of the Faculty of Advocates and any other legally qualified individuals who had provided legal advice to the Ministers on whether the Scottish Parliament had the authority to conduct a referendum on Scottish Independence. Relying on section 18(1) of FOISA, the Ministers refused to confirm or deny whether any information existed or was held in relation to Mr Sloan's request.

Following an investigation, the Commissioner found that the notice which the Ministers had purported to give to Mr Sloan under section 18(1) was deficient. She required the Ministers to respond appropriately to Mr Sloan's request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority); 16(1), (2) and (3) (Refusal of request); 18 (Further provision as respects responses to request); 73 (Interpretation) (interpretation of "refusal notice")

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 16 January 2012, Mr Sloan wrote to the Ministers requesting the following information:
“..a list of the Solicitors, Solicitor Advocates, Members of the Faculty of Advocates and any other legally qualified individual who has provided legal advice to the Scottish Ministers on the issue of whether the Scottish Parliament currently has authority to conduct a referendum on Scottish Independence.”

Mr Sloan made it clear that he was not seeking the content of any legal opinion, but rather a list of the names of legally qualified individuals who supplied legal advice to the Ministers between 1 January 2011 and 16 January 2012.



2. The Ministers did not respond to this request and, on 16 February 2012, Mr Sloan wrote to the Ministers requesting a review.
3. The Ministers responded to Mr Sloan's request for review on 11 April 2012. They apologised for the delay in replying, and informed Mr Sloan that they were relying on section 18(1) of FOISA to refuse to reveal whether the information he had requested existed or was held by them. In their response, the Ministers listed the exemptions in section 18(1) which can be used when a public authority neither wishes to confirm or deny that information exists or is held, but did not specify which of these exemptions they were relying on in this case.
4. On the same day, Mr Sloan wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Sloan asked the Commissioner to investigate a number of issues, including whether the notice issued by the Ministers was technically deficient.
5. The application was validated by establishing that Mr Sloan had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

6. On 26 April 2012, the Ministers were notified in writing that an application had been received from Mr Sloan. They were given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and were asked to respond to specific questions. The Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable.
7. The relevant submissions received from both the Ministers and Mr Sloan will be considered fully in the Commissioner's analysis and findings below.
8. As noted above, the Ministers relied upon section 18(1) of FOISA in responding to Mr Sloan's request. In their response to Mr Sloan, the Ministers did not cite an exemption to be read in conjunction with section 18(1). The Ministers argued that they were not required to do this, while Mr Sloan argued that they were. This is the focus of this decision.
9. It should be noted that the Ministers advised the Commissioner that they were not relying on section 18(1) to refuse to say whether or not the Government had actually received any legal advice, but only to refuse to confirm or deny the source(s) of the legal advice.



Commissioner's analysis and findings

10. Section 18(1) of FOISA gives a Scottish public authority the right to refuse to reveal whether information exists or is held by it, but only in limited circumstances. These circumstances are as follows:
 - a request has been made to the authority for information which may or may not be held by it;
 - if the information existed and was held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 39(1) or 41 of FOISA and;
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest.
11. As noted above, the Ministers did not notify Mr Sloan which of the exemption(s) they wished to rely on. The Ministers argued that section 18(1) does not specifically require that a refusal notice under section 18(1) is subject to section 16, or that a refusal notice under section 18(1) has to specify which exemption(s) would otherwise be relied upon. The Commissioner does not accept this position.
12. Section 18(1) specifically gives the public authority the right to issue a *refusal notice*, which refuses to reveal whether information exists or is held by it. It also provides that this can only happen where the authority could give a refusal notice under section 16(1). The Commissioner understands that there are two types of refusal notices here; firstly, the refusal notice in terms of section 18(1) and, secondly, the refusal notice which the authority could give under section 16(1). For a notice to be issued under section 18(1), it is a requirement that the public authority must be able to give a notice under section 16(1).
13. The term 'refusal notice' is defined by section 73 of FOISA, as having the meaning given by section 16(1) of FOISA (including that section as read with section 18(2)).
14. Section 16(1) defines a refusal notice for the purposes of FOISA as a notice in writing which:
 - a. discloses that a public authority holds the information it has been asked for;
 - b. states that the authority claims that the information is exempt information by virtue of any provision in Part 2 of FOISA;
 - c. specifies the exemption(s) in question; and
 - d. states (if not otherwise apparent) why the exemption(s) applies/apply. (Section 16(2) makes it clear that, when applying an exemption which does not confer absolute, the notice must also state the authority's reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.)



15. When issuing a refusal notice under section 18(1), section 18(2) provides that neither sections 16(1)(a) or 16(2) apply. This means that a refusal notice under section 18(1) does not need to confirm whether the public authority holds the relevant information, or set out the public authority's reasons for concluding that the public interest would favour maintaining the exemption(s) that would apply, if it were held.
16. The specific exclusion of these requirements of section 16(1) when issuing a refusal notice under section 18 strongly suggest to the Commissioner that the remaining requirements (sections 16(1)(b), (c) and (d)) must be fulfilled when issuing a refusal notice under section 18(1) (subject to section 16(3) of FOISA, which removes the obligation to make a statement under section 16(1)(d) if doing so would reveal exempt information).
17. Section 16(1)(c) specifically requires that the public authority specify the exemption(s) in question.
18. Given that the Ministers failed to specify which of the exemption(s) in sections 28 to 35, 39(1) or 41 they would apply to the information, if it existed and were held, the Commissioner concludes that the notice issued by the Ministers was technically deficient in that it did not comply with section 16(1)(c) of FOISA.
19. As the Commissioner concluded that the refusal notice served was deficient, she did not go on to consider whether the Ministers were entitled to refuse neither to confirm nor deny that the information requested by Mr Sloan exists or is held. However, the Commissioner requires the Ministers to respond to Mr Sloan's request in accordance with section 1(1) and, if relevant, by fulfilling the requirements of section 18(1) of FOISA, as read with section 16.

Technical issues

20. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to certain exceptions which are not relevant in this case.
21. The Ministers acknowledged that they did not respond to Mr Sloan's original request within the timescale set out in section 10(1). They stated that this failure was due to the pressure of work on the lead unit within the Scottish Government dealing with the referendum consultation.
22. Section 21(1) of FOISA gives authorities a maximum of 20 working days after receipt of the requirement to comply with a requirement for review, again subject to exceptions which are not relevant in this case.
23. Again, the Ministers acknowledged that they failed to respond to Mr Sloan's requirement for review within the statutory timeframe. The Commissioner therefore concludes that the Ministers failed to comply with sections 10(1) and 21(1) of FOISA.



DECISION

The Commissioner finds that the Ministers failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Sloan. By failing to provide Mr Sloan with an adequate response to his request, the Ministers failed to comply with section 1(1) of FOISA. The Commissioner therefore requires the Ministers to provide Mr Sloan with an appropriate response to his request, fulfilling, if relevant, the requirements of section 18(1) of FOISA as read with section 16. The Commissioner requires the Ministers to do so by 19 July 2013.

The Commissioner also finds that the Ministers failed to respond to Mr Sloan's request and requirement for review within the relevant timescales as set out in sections 10(1) and 21(1) of FOISA. The Commissioner does not require any action in respect of these technical failings.

Appeal

Should either Mr Sloan or the Scottish Ministers wish to appeal against this decision, there is an 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.

Rosemary Agnew
Scottish Information Commissioner
3 June 2013



Appendix

Relevant statutory provisions

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.

...

- (6) This section is subject to sections 2, 9, 12 and 14.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-

- (a) discloses that it holds the information;
- (b) states that it so claims;
- (c) specifies the exemption in question; and
- (d) states (if not otherwise apparent) why the exemption applies.



- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.
- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.

...

18 Further provision as respects responses to request

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 39(1) or 41 but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

73 Interpretation

In this Act, unless the context requires a different interpretation-

...

“refusal notice” has the meaning given by section 16(1) (including that section as read with section 18(2));

...