

Decision Notice 110/2021

Analysis on Scotland's eligibility for EU membership

The Applicant

Public authority: Scottish Ministers

Case Ref: 202000658



Scottish Information
Commissioner

Summary

The Ministers were asked for any correspondence or analysis they held on Scotland's eligibility for EU membership.

The Ministers advised that providing the information would cost in excess of £600 and applied section 12 of FOISA.

The Commissioner investigated and upheld section 12 of FOISA. However, he was also critical of the Ministers' handling of the case.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 12(1) (Excessive cost of compliance); 15(1) (Duty to provide advice and assistance)

The Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004 (the Fees Regulations) regulations 3 (Projected costs) and 5 (Excessive cost – prescribed amount)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

Background

1. On 11 August 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant stated:

“I have noted that the language being used by the Scottish Government in relation to the possibility of Scotland being independent after Brexit seems to [sic] "an independent European country", not an "independent country in the EU". As such, there are two parts to my query.

 - (i) Details of any guidance given in relation to the use of the two phrases above
 - (ii) Any correspondence or analysis the Scottish Government has carried out on our eligibility for EU membership, either if we could continue to "remain" in the EU or having to reapply under the Copenhagen criteria once the UK has left.”
2. On 15 August 2019, the Ministers asked the Applicant for clarification on the scope of his request. They stated that it would be helpful to know the type of correspondence he was seeking and the time range for the correspondence. They informed the Applicant that requesting all forms of correspondence could result in the request exceeding the costs threshold in section 12 of FOISA.
3. The Applicant replied the following day. He stated that he was looking for letters and emails, particularly between Government Ministers, Special Advisors, and the EU, “going back to advice taken for the independence referendum of 2014 to present.” The Applicant also asked the Ministers “perhaps you could advise what you would be able to release without exceeding the limit?”
4. On 16 August 2019 the Ministers asked him if the timespan of his request was from 18 September 2014 to the present date, and stated that they would not be able to guide him further until they had clarified the scope.

5. The Applicant responded, again on the same day, confirming that he was looking for a timeframe from October 2012 to the present date.
6. The Ministers issued their response on 6 September 2019. They notified the Applicant, in terms of section 17(1) of FOISA, that the following information was not held:
 - (i) Guidance on the use of “an independent European country” over “independent country in the EU.”
 - (ii) Correspondence from Ministers or Special Advisors to any of the European Institutions regarding membership in either scenario stated above.
 - (iii) Analysis which looks at the Scottish Government eligibility for EU membership if the whole of the United Kingdom remains a member state.
7. The Ministers withheld information related to his request for analysis carried out by the Scottish Government on Scotland’s eligibility to apply for membership once the UK has left the European Union under the exemption at section 29(1) of FOISA (Formulation of Scottish Administration policy etc.).
8. Later that day, the Applicant wrote to Ministers requesting a review of their decision on the basis that he considered the public interest favoured disclosure of the withheld information. The Applicant submitted a new request at this point, seeking an audit trail of his request, including any SPAD (special adviser) involvement.
9. The Ministers notified the Applicant of the outcome of their review on 1 October 2019. They upheld their reliance on sections 17(1) and 29(1)(a) of FOISA, and maintained that the public interest favoured withholding the information.
10. On 9 October 2019, the Applicant wrote to the Commissioner for a decision. The case was investigated, and, on 5 February 2020, the Commissioner issued a decision in which he found that the Ministers had used an unreasonably narrow interpretation of the word “analysis”. He required them to carry out further searches of a broader remit and issue a revised review response to the Applicant¹.

The revised review response

11. On 20 March 2020, the Ministers issued their revised review response. Despite additional searches and a broader definition of the term “analysis”, the Ministers confirmed that no information was held for the following elements:
 - (i) Guidance on the use of “an independent European country” over “independent country in the EU.”
 - (ii) Correspondence from Ministers or Special Advisors to any of the European Institutions regarding membership in either scenario stated above.
 - (iii) Analysis which looks at the Scottish Government eligibility for EU membership if the whole of the United Kingdom remains a member state
12. The Ministers identified a further three documents, which were supplied subject to redaction on the basis that sections 29(1)(a) and 30(b)(ii) (Prejudice to effective conduct of public

¹ <https://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2020/201901865.aspx>

affairs) applied and informed the Applicant that some of the information redacted fell outwith the scope of the request.

13. On 21 June 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant argued that it was in the public interest for the Ministers to disclose the redacted parts of the documents.

Investigation

14. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
15. On 29 July 2020, the Ministers were notified in writing that the Applicant had made a valid application. The Ministers were asked to send the Commissioner the information withheld from the Applicant. The Ministers provided the information and the case was allocated to an investigating officer.
16. On 3 September 2020, the Investigating officer wrote to the Ministers to ask them for any submissions they wished to make on the case.
17. On 23 September 2020, the Ministers disclosed in full to the Applicant one of the three partially withheld documents. The Applicant, however, remained unhappy that the Ministers were still withholding some information in the other two documents.
18. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions. These related to the Ministers' reasoning for withholding the information contained within the two remaining documents.
19. The Ministers provided submissions, outlining their reasoning for applying the exemptions in sections 29(1)(a) and 30(b)(ii) to some of the information in the remaining two documents.
20. On 30 November 2020, following the Commissioner's consideration of the information supplied, the Ministers were asked to provide further submissions as to why certain information contained within the two documents was considered by them to be outwith the scope of the Applicant's request.
21. The Ministers responded on 10 December 2020. They submitted that they deemed parts of the information to be factual information, rather than analysis, and therefore took the view that these fell outwith scope.
22. On 12 March 2021, the Ministers were asked for further submissions as a result of further concerns about how the Applicant's request had been interpreted. The Commissioner expressed his surprise that there was not more information (aside from the documents which had been located) falling within scope of the request. He was of the view that some of the information, from a list of documents which the Ministers had provided as being outwith scope, might actually be within scope. He therefore asked the Ministers to provide him with a sample of specified documents from that list in order that he could view their content. Finally, he also asked whether any legal advice on the matter existed, as this could also amount to analysis.
23. The Ministers responded on 6 April 2021 and submitted that, in retrospect, they had taken an overly narrow view of the scope of the Applicant's request. They stated that their previous

searches had been limited to the period from June 2016 to the date of the request, because they had incorrectly interpreted the request to cover information held post EU referendum, whereas the requester had confirmed that he was looking to receive any information held between October 2012 and the date of the request.

24. Given the volume of information they had now identified under the broader timeframe, the Ministers estimated that to comply with the request would substantially exceed the upper cost limit. They subsequently wished to rely on section 12 of FOISA, given the volume of information they would require to search through to properly comply with the request. The Ministers did not provide any submissions on how they had reached this conclusion.
25. Therefore, on 8 April 2021, the Ministers were asked to provide their submissions on section 12(1) of FOISA and on 16 April 2021 they provided these to the investigating officer.

Commissioner's analysis and findings

26. In coming to a decision on this matter, the Commissioner considered the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Section 12(1) – Excessive cost of compliance

27. Section 12(1) of FOISA provides that a Scottish public authority is not obliged to comply with a request for information where the estimated cost of doing so would exceed the amount prescribed in the Fees Regulations. This amount is currently set at £600 (regulation 5).
28. The projected costs the authority can take into account in relation to a request for information are, according to regulation 3 of the Fees Regulations, the total costs, whether direct or indirect, which the authority reasonably estimates it is likely to incur in locating, retrieving and providing the information requested in accordance with Part 1 of FOISA.
29. The authority may not charge for the cost of determining whether it:
 - (i) actually holds the information requested or
 - (ii) should provide the information.
30. The maximum rate a Scottish public authority can charge for staff time is £15 per hour.
31. The Commissioner has no power to require the disclosure of information should the cost of doing so exceed the prescribed amount (current £600).

Submissions from the Ministers

32. The Ministers accepted that they had failed to take a sufficiently broad interpretation of “analysis” and that they should have interpreted the request to include any information which sets out careful consideration of Scotland’s eligibility for EU membership. The Ministers also apologised the Applicant for this.
33. The Ministers reiterated that the searches initially carried out covered only the period from June 2016 to 16 August 2019, because they had incorrectly interpreted the request to cover information held post EU referendum. The searches therefore did not fully cover the period between October 2012 to 16 August 2019.
34. The Ministers stated that they had subsequently undertaken new sample searches to identify any information over the time period 1 October 2012 to 16 August 2019. These were

conducted using two separate methods, one which considered targeted searching of specific files and also one which used keywords across their electronic management system to try to minimise the returns to a manageable level whilst ensuring the searches were sufficiently robust.

35. Each search method produced an extensive body of information which, according to the Ministers, would require further careful consideration to identify the specific information falling within the scope of the request. The Ministers therefore determined that the costs of locating, retrieving and providing the information requested would exceed the upper cost limit of £600.
36. The Ministers further explained to the Commissioner and the Applicant how they had reached this conclusion. Given the nature of the request, using keyword searching identified over 10,000 returns. Although some information could be held across the records of the Scottish Government, the information was most likely to be held by DG Constitution and External Affairs. Targeted searching of specific files held in this area, although more limited, still identified in excess of 2,000 returns as potentially being within scope of the request. Each return would need to be sifted to determine whether it contained the specific information relevant to the request.
37. Once the Ministers had identified the specific information relevant to the request they would then have to establish if any FOISA exemptions would apply to any of the information and redact this information as appropriate.

File search method

38. On a sample search, it took the case handler 30 minutes to identify 13 individual files which would be likely to hold information relating to this request.
39. These files would need to be interrogated individually in order to identify the specific information held within scope. The identified folders contained 2,119 documents which could potentially fall within the scope of the request. Taking a sample of 30 documents, sifting took 30 minutes (therefore, on average, one minute per document). Assuming this was the case for the 2,119 documents would mean that the time taken to sift would be 2,119 minutes to consider the documents in the 13 folders listed above.
40. Of the 30 documents sifted, 11 documents were found to be in scope. Assuming that this would be replicated across the documents for the purposes of this estimate would mean that 37% of the 2,119 initial documents would fall in scope of the request, i.e. 784 documents. The Ministers advised the Commissioner that it is likely that most of these documents would require redaction prior to release, although some would be either released in full or withheld in their entirety.
41. The Ministers estimated that 75% of the 784 documents would require redaction, i.e. 588 documents. Completing the required redaction in three documents took 15 minutes, so this translates to an average of five minutes per document for 588 documents equating to 2,940 minutes.
42. The Ministers stated that they had determined the cost of responding based on a capped staff hourly rate of £15.00 for a grade B2 staff member. This amounted to approximately 85 hours @ £15 per hour = £1,275.00.

Keyword search method

43. The Ministers submitted that the cost of searching by this method would cost significantly more, with a total search, sift and redaction costing of £3,405.00 (requiring approximately 227 hours of staff time at £15.00 per hour).

The Commissioner's findings

44. Given the explanations provided by the Ministers, and having considered the nature of the work involved, the Commissioner is satisfied that the Ministers could not have complied with the Applicant's request within the £600 cost limit. Consequently, he finds that the Ministers were entitled to rely on section 12(1) of FOISA and were under no obligation to comply with the request.
45. The Commissioner notes that the Ministers wrote to the Applicant on 16 April 2021 giving him a detailed breakdown of how his request in its current terms would exceed the £600 costs threshold and advising him to consider reducing the scope of his request in order that he may at least receive some of the information falling within scope.
46. He also notes that they also provided the Applicant with various website links which might be of assistance to him, and explained that some of the information held was likely to be drafts of documents which had subsequently been published. In this regard, they provided the Applicant with website links to certain publications that they felt may be of interest to him.
47. Section 15 of FOISA provides that a Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Commissioner notes that the Ministers' response to the Applicant of 16 April 2021 detailed possible methods to allow the Applicant to reduce the scope of this request. Although failing in their initial handling, the Commissioner is now satisfied that it has provided the Applicant with reasonable advice and assistance to satisfy section 15 of FOISA to allow him to narrow the scope of this request.

The Ministers' handling of the case

48. The Commissioner finds it necessary to comment on the Ministers' handling of this case. As noted in paragraphs 4 and 5 above, the Applicant confirmed to the Ministers, at an early stage in the request handling, the timespan of this request.
49. It appears that the Ministers either chose to disregard this timeframe or simply failed to take proper note of it.
50. It was only after the Commissioner had asked the Ministers to provide further submissions on why they considered that a lot of information was outwith scope, and after he had asked them to provide him with copies of sample documents from those deemed outwith scope, that the Ministers accepted their flaw in the search parameters.
51. It is deeply concerning that, despite initial doubts over the interpretation of this request, as highlighted in *Decision 027/2020*, the Ministers continued to take an overly restrictive interpretation. As a result, two substantive decisions have been issued on the same request, but unfortunately resulting in very little information disclosed to the Applicant almost two years after the submission of the original request.
52. In the light of this the Commissioner will be considering the handling of this case further as part of his ongoing intervention into the Ministers' compliance with FOISA and the EIRs.

Decision

The Commissioner finds that the Scottish Ministers 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 Ministers 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.

Daren Fitzhenry
Scottish Information Commissioner

13 July 2021

Appendix 1: 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.
...
- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.
...
- (6) This section is subject to sections 2, 9, 12 and 14.

12 Excessive cost of compliance

- (1) Section 1(1) does not oblige a Scottish public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed such amount as may be prescribed in regulations made by the Scottish Ministers; and different amounts may be so prescribed in relation to different cases.
...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.
...

Freedom of Information (Fees for Required Disclosure) (Scotland) Regulations 2004

3 Projected costs

- (1) In these Regulations, "projected costs" in relation to a request for information means the total costs, whether direct or indirect, which a Scottish public authority reasonably estimates in accordance with this regulation that it is likely to incur in locating, retrieving and providing such information in accordance with the Act.
- (2) In estimating projected costs-
 - (a) no account shall be taken of costs incurred in determining-
 - (i) whether the authority holds the information specified in the request; or
 - (ii) whether the person seeking the information is entitled to receive the requested information or, if not so entitled, should nevertheless be provided with it or should be refused it; and

- (b) any estimate of the cost of staff time in locating, retrieving or providing the information shall not exceed £15 per hour per member of staff.

5 Excessive cost - prescribed amount

The amount prescribed for the purposes of section 12(1) of the Act (excessive cost of compliance) is £600.

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