

Decision Notice

Decision 139/2017: Mrs Lesley Scott and the Scottish Ministers

Meetings about the Named Person policy

Reference No: 201700324

Decision Date: 29 August 2017



Scottish Information
Commissioner

Summary

The Ministers were asked for minutes of meetings relating to John Swinney's engagement with the Named Person policy. At review, the Ministers explained that the information would be published within 12 weeks of the date of the request (section 27(1) of FOISA) and stated that the public interest favoured withholding the information to ensure checking and proper collation before publication.

The Ministers subsequently published the information and informed the requester it had been published.

The Commissioner investigated whether all information covered by the request had been published. She accepted that the Ministers had identified and published all the information they held falling within the terms of the request. She did not require the Ministers to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1)(a) (Timescale for response); 27(1) (Information intended for future publication)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. Following the Supreme Court judgment of 28 July 2016 on the information sharing provisions in the Children and Young People (Scotland) Act 2014¹ (the 2014 Act), the Deputy First Minister, Minister for Childcare and Early Years, and officials from the Scottish Government's GIRFEC ("Getting It Right For Every Child") team engaged with practitioners, public agencies, third sector organisations, and members of the public, including parents and children and young people, as part of the Scottish Government's three month intensive engagement programme.
2. This engagement, between September and December 2016, included discussions on how to address the concerns that the Supreme Court raised, the principles that should underpin legislation on information sharing and the development of guidance to set out how information should be shared under the legislation. It involved over 50 meetings and some 250 organisations and groups. It included around 700 young people, parents and carers, practitioners, professionals and leaders from education, health, local authorities, police, faith communities, unions and charities. The Ministers sought input from those who supported the Named Person policy and those who had concerns.

¹ <https://www.supremecourt.uk/cases/uksc-2015-0216.html>

3. On 12 January 2017, Mrs Scott made a request for information to the Scottish Ministers (the Ministers). Mrs Scott requested all minutes of all meetings, or the information contained in the minutes, relating to Mr John Swinney's "three month period of intense engagement in Scotland over the Named Person policy". (Mrs Scott made this request after the Ministers had refused a previous, wider request for all minutes, documents, communications or information relating to the same subject, on the grounds that it would cost more than £600 to provide the information; the Ministers had advised Mrs Scott to narrow her request.)
4. Having received no response to her request other than an apology that the response was going to be outwith the statutory time period, Mrs Scott wrote to the Ministers on 10 February 2017, requesting a review of their decision on the basis that the Ministers had failed to respond to her request.
5. The Ministers notified Mrs Scott of the outcome of their review on 14 February 2017. The Ministers apologised again for the delay in responding to her request. They withheld the information she had requested under section 27(1) of FOISA and explained that it would be published within 12 weeks of the date of her request. The Ministers considered that the public interest favoured withholding the information to ensure checking and proper collation before publication, and said they would inform Mrs Scott when the information was published.
6. On 19 February 2017, Mrs Scott applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mrs Scott was dissatisfied with the decision to withhold the information she had asked for because she believed that the policy related to a matter of considerable significance. She asked the Commissioner to require the Ministers to supply the withheld information to her.
7. On 7 March 2017, the Ministers notified Mrs Scott that the information she had requested had been published. The Ministers explained that all meeting notes from Mr Swinney's three month engagement regarding the named person legislation were available online² and supplied a link to the publication page on the Ministers' website.
8. On 8 March 2017, Mrs Scott wrote to the Commissioner to express her dissatisfaction. She stated that the published information was described as Scottish Government summaries of the discussions which Scottish Government officials and Ministers heard at these meetings, and was not formal minutes agreed by those attending.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mrs Scott made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
10. 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 answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

² <http://www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing/engagement>

11. Mrs Scott's initial application to the Commissioner challenged the Ministers' decision to withhold information under section 27 of FOISA. However, after the Ministers published the meeting summaries (within the 12 week timescale required by section 27), she stated:

"If, in fact, no formal minutes were taken at these meetings then I am satisfied with the information that has now been provided by the Scottish Ministers. However, if any formal minutes were taken, at any of the meetings then I would maintain my appeal for release of that information."
12. The Commissioner's investigation has therefore focussed on the question of whether any formal minutes of the meetings were taken and are held by the Ministers.
13. The Ministers were invited to comment on these issues and the information they held. They responded several times during the investigation.
14. Mrs Scott was invited to comment and to address the arguments put forward by the Ministers, and responded on several occasions.

Commissioner's analysis and findings

15. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, or parts of submissions, made to her by both Mrs Scott and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 1(1) of FOISA – General entitlement

16. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received.

Do the Ministers hold any further information that falls within Mrs Scott's request?

17. If the Ministers held any minute (formal or otherwise) from any of the meetings at the time of Mrs Scott's request, then such information would appear to fall within the terms of her request. This does not seem to be disputed by the Ministers. The Ministers' position, reiterated throughout the Commissioner's investigation, is that they do not hold any formal minutes of the meetings, or any other information that fell within the request, apart from the summaries which were published. The Ministers told the Commissioner on 3 April 2017 that no information was being withheld from Mrs Scott. They stated that, following the Parliamentary statement on information sharing from the Deputy First Minister on 7 March 2017, all meeting notes from Mr Swinney's three month engagement regarding the named person legislation were published³.
18. The Ministers explained that the length and delivery format of each meeting varied to meet the needs of the participants and this variety was reflected in the structure and length of each meeting note posted on their website. In some instances, the notes were produced by the host organisations and reflect their summaries. In all other cases, the summary notes were prepared by Scottish Government officials. The Ministers highlighted that the notes came with a caveat to advise that:

³ <http://www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing/engagement>

"These meeting notes are Scottish Government summaries of the discussions Scottish Government officials and Ministers heard at these meetings, not formal minutes agreed by those attending."

19. The Ministers explained that there were no formal minutes taken at any of the information sharing discussions at any of the meetings held as part of the three month engagement process, regardless of whether the whole meeting was about the information sharing engagement or whether this was only one agenda item. The Ministers were definite in this respect: there are no formal minutes held by the Ministers for any of the meetings; there are no formal minutes of the meetings held by any of the other host organisations; in short, no formal minutes were taken at any of the engagement meetings.
20. The Ministers commented that where the meeting note was taken by another organisation, that organisation may regard the notes as a formal minute of the meeting.
21. The Ministers were asked to explain how they ascertained that they did not hold any formal minutes, or other information falling within Mrs Scott's request. The Ministers replied that no searches were considered necessary; the officials conducting the work on this information request were the staff who had taken the summaries at these meetings. The Ministers were therefore able to be assured by the respective staff that they did not take formal minutes for any of the meetings, only the summaries which had been published.
22. The Ministers were asked to explain if there had been any official communication published or circulated before the meetings which made it clear that formal minutes would not be taken by the Scottish Government for these meetings. The Ministers replied that, due to the nature of the meetings and the variety of attendees and the subsequent data protection considerations, it was felt that it would be most appropriate to take only summary notes, as these would be easier to publish. The Ministers did not hold any evidence of this decision "as it was part of the wider discussion on the planning of the engagement meetings".
23. Mrs Scott said that the summaries of some meetings suggested that more information was held by the Ministers. She gave seven examples, including one from the summary⁴ of the meeting with Children 1st and Minister for Childcare and Early Years:

"This was a wider meeting between Children 1st and the Minister for Childcare and Early Years, with range of SG [Scottish Government] policy discussed. The Named Person was not discussed in detail at this meeting ..."
24. The other examples were provided by Mrs Scott were summaries of:
 - the meeting with Children and Young People's Commissioner Scotland and Deputy First Minister and Cabinet Secretary for Education and Skills⁵
 - the meeting with Children's Hearings Scotland⁶
 - the meeting the National Autistic Society⁷
 - the meeting with NHS Chief Executives and Deputy First Minister and Cabinet Secretary for Education and Skills⁸

⁴ <http://www.gov.scot/Resource/0051/00514960.pdf>

⁵ <http://www.gov.scot/Resource/0051/00514961.pdf>

⁶ <http://www.gov.scot/Resource/0051/00514964.pdf>

⁷ <http://www.gov.scot/Resource/0051/00514988.pdf>

- the meeting with Scottish Parent Teacher Council and Deputy First Minister and Cabinet Secretary for Education and Skills⁹
 - the Strategic Workshop - Social Work Scotland/Chief Social Work Officers¹⁰
25. The summary of the meeting that took place with NHS Chief Executives and the Deputy First Minister on 9 November 2016 referred to it as "part of the larger meeting with NHS Chief Executives". Mrs Scott believed this implied that it was part of the usual regular meeting with NHS Chief Executives, at which minutes are taken and posted on the government website. The meeting of the NHS Chief Executives in August 2016, for example, had on the Agenda an item on the recent UK Supreme Court judgment on the Named Person scheme and the minutes of that meeting record the discussion around that item. Mrs Scott commented:
- "Is it the Scottish Government's position that routine practice is to hold wider meetings with important stakeholder organisations but not to maintain any formal record at all of what is discussed? This seems unlikely and if true, extremely concerning."
26. Mrs Scott's point (that the published summary may represent only part of a wider meeting) was put to the Ministers. The Ministers were asked whether they held any recorded information about the meetings listed by Mrs Scott. The Ministers were also asked to supply the Commissioner with any recorded information about the meetings that they had adjudged to be out of scope of Mrs Scott's request. The Commissioner made it clear to the Ministers that Mrs Scott's request, as framed, might include information about any subject that was part of the meeting in which the named person information sharing provisions were discussed. That being so, the Commissioner would expect such information to be provided to her for the purpose of her investigation and decision.
27. The Ministers responded that Mr Swinney's three month engagement was specific to discussions on the information sharing provisions in the 2014 Act. This included discussions on how to address the concerns that the Supreme Court raised, the principles that should underpin legislation on information sharing and the development of guidance to set out how information should be shared under the legislation. The notes of these were all published. No other formal minutes or notes were taken by the GIRFEC team at any of the information sharing discussions that took place at any of the meetings as they were not pertinent to the engagement on the information sharing provisions.
28. Mrs Scott thought it highly unlikely that the meetings she had listed did not have formal minutes taken. She found it even more unlikely that specific agenda items within the context of wider meetings, such as Named Person and information sharing, did not have minutes taken.

The Commissioner's conclusions

29. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. She will also consider, where appropriate, any reason offered by the public authority to explain why the information (or, in some cases, more information) is not held.

⁸ <http://www.gov.scot/Resource/0051/00514992.pdf>

⁹ <http://www.gov.scot/Resource/0051/00515001.pdf>

¹⁰ <http://www.gov.scot/Resource/0051/00515004.pdf>

30. Having considered all the relevant submissions, the Commissioner accepts that the Ministers have taken adequate and proportionate steps to establish whether they held information that fell within the scope of Mrs Scott's request. In reaching this conclusion, the Commissioner has taken into account that the staff involved in preparing a response to Mrs Scott's request had experience and knowledge of the subject, thus reducing the likelihood of an incorrect response or relevant information being overlooked.
31. The Commissioner has also taken into account that the Ministers have published the meeting summaries. The Ministers are not claiming that they do not have any recorded information relating to the meetings. The information does not comprise formally recorded minutes of each meeting, as Mrs Scott expected, and it does not provide the level of detail that she hoped to receive. The Ministers have explained that, due to the nature of the meetings, the variety of attendees and data protection considerations, it was felt that it would be most appropriate to take only summary notes as these would be easier to publish. Mrs Scott strongly disagrees with this approach, but, in terms of the Commissioner's decision, the issue to consider is what information the Ministers actually held at the time of her request.
32. Mrs Scott is correct to highlight that some of the published summaries do make clear that discussion about information sharing was part of a wider meeting with, presumably, discussions and perhaps decisions on other matters. The Ministers have made clear that any other discussions and decisions at the meetings were not recorded in any way. This may raise broader questions about the way in which the Ministers record (or do not record) information about meetings in which they participate. However, for the purposes of the Commissioner's decision in this case, the issue is not whether the Ministers should have recorded more information, but whether they have disclosed the recorded information that they do hold.
33. In conclusion, the Commissioner is satisfied, on the balance of probabilities, that Mrs Scott has been provided with all of the information held by the Ministers which falls within the scope of her request.

Duty to provide reasonable advice and assistance

34. Mrs Scott expressed dissatisfaction that the Ministers' review response (which followed their initial failure to respond in time to her request) did not make it clear that minutes were not taken at any of the meetings. The Ministers simply refused her request for minutes on the grounds that they intended to publish "that information" within 12 weeks of the date of her request, and considered it reasonable to withhold the information until that time. The Ministers did not explain that the only information they held was (in her view) "scant notes...as a record of events that were to be used to direct and influence the drafting of new legislation for the Named Person scheme."
35. The Ministers were invited to comment on this. The Ministers considered that, from the onset of her query, Mrs Scott was made aware that no formal minutes were taken. They had provided a link to the meeting notes¹¹ on 7 March 2017 where it was made clear that the notes were summaries, and not minutes. During the Commissioner's investigation, Mrs Scott was again made aware that no formal minutes were taken. The Ministers quoted Mrs Scott's own statement: "If, in fact, no formal minutes were taken at these meetings then I am satisfied with the information that has now been provided by the Scottish Ministers". They

¹¹ <http://www.gov.scot/Topics/People/Young-People/gettingitright/information-sharing/engagement>

took this to indicate that, from the beginning, Mrs Scott was aware that the records of the meetings consisted of summaries.

36. The Commissioner does not accept the Ministers' submission on this point. There is no evidence that Mrs Scott was made aware "from the onset of her query" that minutes were not taken and were not available. The Ministers missed an opportunity to engage with Mrs Scott and make her aware of this by failing to respond in time to her initial request. When the Ministers relied on section 27(1) at review, it would have assisted Mrs Scott if they had indicated that the information they held was not a minute, formal or otherwise, but a summary of the meeting. Such advice would have assisted Mrs Scott by letting her know what to expect when the information was published.
37. Users of FOI, however experienced they are, cannot be expected to have the same knowledge of the information held by a public authority as the public authority itself. In this case, Mrs Scott asked for information that she thought would reflect the content and conclusion of a meeting: she therefore asked for "minutes".
38. The Commissioner accepts that the meeting summaries were covered by Mrs Scott's request for "minutes", which is a term used to describe a wide variety of meeting notes, and could cover meeting summaries as well as the formal meeting minutes which Mrs Scott hoped to receive. The summaries do narrate and evidence the content of the meeting.
39. However, it would have assisted Mrs Scott if the Ministers had made clear *at review* that the information falling within her request and which they intended to publish was a summary, not a formal meeting minute.
40. Section 15(1) of FOISA requires a public authority, so far as it reasonable to do so, to provide advice and assistance to a person who proposes to make, or has made, a request for information to it. The Commissioner takes the view that the lack of clarity around the nature of the information which was held does not amount to a failure in terms of section 15 of FOISA, but it was a point on which practice could have been improved. Providing this explanation to Mrs Scott would have made the review response from the Ministers more intelligible to her.
41. The Commissioner accepts that the position was made clear to Mrs Scott when the information was published.

The Commissioner's remit

42. Mrs Scott expressed concern about the information she received and the level of detail it provided. As already stated, the Commissioner has found that the Ministers do not hold any more information covered by her request. Mrs Scott has expressed the view that more information *should* have been recorded by the Ministers: such an important issue required more detailed recording. Mrs Scott put forward the view expressed by a person who had attended one of the meetings:

"In terms of what was covered, the key points are there but it does not accurately reflect the range of views expressed. Many of those there expressed concern about NP [Named Person] where they had not previously."
43. Mrs Scott asked the Commissioner to address these concerns in her decision.
44. As stated in many previous decisions, the Commissioner cannot comment on the accuracy of any recorded information an authority holds.

45. Although it was unrecorded, the Commissioner accepts that there was a deliberate decision to create meeting summaries instead of formal minutes for the meetings relating to the information-sharing provisions of the Named Person policy. The Commissioner gives no consideration here, and comes to no conclusion, as to whether the Ministers *should* have recorded more information or recorded the information as formal minutes of any of the meetings. Such questions are beyond the remit of the Commissioner and rather go to the proper functioning of a Scottish public authority in respect of its duties.

Decision

The Commissioner finds that the Ministers generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs Scott.

The Commissioner accepts that the Ministers took a reasonable interpretation of the request and identified all the information falling within the request. The information was published within the timeframe indicated by the Ministers at review. The Ministers failed to respond to Mrs Scott's request within the timescale required by section 10(1) of FOISA.

Appeal

Should either Mrs Scott 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.

Margaret Keyse
Acting Scottish Information Commissioner

29 August 2017

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.

...

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

...

27 Information intended for future publication

- (1) Information is exempt information if-

- (a) it is held with a view to its being published by-
- (i) a Scottish public authority; or
 - (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

- (b) when that request is made the information is already being held with that view; and

- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

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