

Decision Notice

Decision 150/2016: Mr Tommy Kane and the Scottish Ministers

Appointments attended by the First Minister

Reference No: 201600425

Decision Date: 6 July 2016



Scottish Information
Commissioner

Summary

On 25 November 2015, Mr Kane asked the Scottish Ministers (the Ministers) for information about two meetings attended by the First Minister.

The Ministers disclosed some information about the first meeting, and informed Mr Kane that they did not hold any information about the second meeting, which was private. Following a review, in which the Ministers disclosed additional information, Mr Kane remained dissatisfied and applied to the Commissioner for a decision.

The Commissioner investigated and found that the Ministers had properly responded to Mr Kane's request for information in accordance with Part 1 of FOISA, and did not hold any further information regarding his request for information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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 25 November 2015, Mr Kane made a request for information to the Ministers:

In relation to the following meetings (see below), that the First Minister attended I would like:

To know the purpose of the meeting, the names of all those that attended the meeting, a copy of the agenda of the meeting, a copy of any pre meeting briefing, note or minute taken from the meeting and any action points/post meeting briefing that was produced as a result of the meeting.

- (i) *Dinner with Charlotte Street Partners on the 15th January 2015* [the January dinner]
 - (ii) *Andrew Wilson, Charlotte Street Partners, 16th June 2015* [the June meeting]
2. The Ministers responded on 24 December 2015. They provided Mr Kane with some information relating to the January dinner, but gave him notice under section 17(1) of FOISA that they did not hold any information relating to the June meeting as this was a private meeting and did not relate to Mr Wilson's role with Charlotte Street Partners.
3. On 18 January 2016, Mr Kane wrote to the Ministers requesting a review of their decision. He expected the Ministers to hold additional information regarding the January dinner. Mr Kane also questioned whether the June meeting was a private meeting. He contended that, even if it was private, the public had a right to know why the First Minister was meeting with Mr Wilson.

4. The Ministers notified Mr Kane of the outcome of their review on 3 February 2016. The Ministers disclosed further information regarding the January dinner. They maintained that the June meeting was a private meeting and that they did not hold any of the information Mr Kane had requested regarding it.
5. On 4 March 2016, Mr Kane applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Ministers' review because he believed that the Ministers held more information regarding the January dinner than they had disclosed. He also did not accept that the June meeting was a private meeting or that the Ministers were entitled to withhold information from him on the basis that the meeting was private.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Kane 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.
7. On 21 March 2016, the Ministers were notified in writing that Mr Kane had made a valid application and the case was 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 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.

Commissioner's analysis and findings

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

Section 17 - information not held

10. 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. This is subject to qualifications, but these are not applicable in this case. 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.

Submissions from Mr Kane

11. With regard to the January dinner, Mr Kane noted that an array of business people attended this event, each with their own set of issues. In order to be prepared, he expected that the First Minister would have received briefings that highlighted these issues. Mr Kane also argued that the First Minister would have taken a note and minutes of any issues raised at this meeting. As no such information had been disclosed in response to his request, Mr Kane queried whether the Ministers had identified all relevant information regarding the January dinner.
12. Mr Kane challenged the Ministers' assertion that the June meeting was a private meeting. He asked why, if it was a private meeting, the diary entry stated that the meeting was with Andrew Wilson, Charlotte Street Partners, rather than just Andrew Wilson as an individual.

Mr Kane submitted that Charlotte Street Partners is a prominent lobbying firm. If the First Minister was meeting this organisation then he believed it was an inadequate response to state that no information would be given as it was a private meeting. Mr Kane argued that such a meeting should be open to scrutiny using freedom of information legislation and “to argue otherwise neither applies the spirit or the substance of the law”.

Submissions from the Ministers

13. With regard to both the January dinner and the June meeting, the Ministers explained that they had conducted searches of the First Minister’s email inbox and calendar as well as searching the Scottish Government’s electronic documents management system (eRDM) with the search criteria “Charlotte Street Partners”.
14. In relation to the January dinner, the Ministers submitted that the outcome of these searches established that no notes of this meeting were taken and recorded. Staff from the First Minister’s private office (Private Secretaries) and staff who represent her in a political capacity (Special Advisers) were consulted and conducted personal searches, none of which returned any notes taken at the dinner. The Ministers stated that these particular colleagues were consulted as they would have been supporting the First Minister around this dinner, and that they could confirm that no notes were taken.
15. The Ministers explained that Scottish Government officials record meetings in line with civil service custom and practice, and to comply with the Public Records (Scotland) Act 2011. The January dinner was an “informal dinner and Q and A event” and, therefore, no record was taken. The Ministers maintained that the only briefing notes they had identified was a briefing from Transport Scotland which had already been disclosed to Mr Kane.
16. With regard to the June meeting, the Ministers confirmed that none of the searches described in paragraph 13 had identified any relevant documents. The Ministers submitted that no support staff were present during the meeting and the searches confirmed that no notes were taken and recorded at the meeting. The Ministers maintained that this was a private meeting between the First Minister and Mr Wilson.
17. When questioned why, if it was a private meeting, the diary entry included the name of Mr Wilson’s company, the Ministers explained that Mr Wilson’s company (Charlotte Street Partners) was entered into the diary purely for informative purposes and primarily for the benefit of the First Minister’s Private Office, so that they would be aware of who the attendee was. Private office staff have to sign in and escort all visitors for the First Minister from the Parliament’s reception area and, in order to do this, they need to know the identity of the visitor and (where relevant) their company.
18. In line with civil service custom and practice, the First Minister’s published diary only includes official Ministerial engagements, conducted as part of Scottish Government business. They explained how private appointments are recorded in the First Minister’s diary and submitted that “*It would be usual in any Private Office, including the FM’s office to include reference to a “private appointment” to organise the Ministers time*”.
19. The Ministers initially submitted that the reference to the June meeting was entered into the diary purely for “informative purposes”, primarily for the benefit of the First Minister’s Private Office. The Ministers later submitted that the diary entry for a “private appointment” would be removed after the event had taken place, because it would not form part of the official record of Scottish Government business.

20. When questioned why the June meeting was not described as a “private appointment” in the published diary of the First Minister (which is accessible online), the Ministers responded: “*We have explained that this private meeting was included in this publication in error*”. The Ministers acknowledged that the published diary list does not contain any other “private appointments” and submitted that the inclusion of the June meeting was an administrative error: it is normal practice for “private appointments” to be removed from Ministerial diaries after their occurrence, but in this instance the June meeting was left in.

The Commissioner’s conclusions

21. With regard to the January dinner, the Commissioner acknowledges Mr Kane’s concerns that the information disclosed is far less than he expected. However, she is satisfied that the searches conducted by the Ministers were likely to have identified all the information they held, and accepts that they have disclosed all relevant information to Mr Kane. It is not the Commissioner’s place to comment on whether the First Minister should or should not have had briefings from her staff before the dinner, or taken notes at the dinner. Her remit is to consider what was actually held and she accepts that no such information exists. The Ministers have explained that the January dinner was an informal Q and A event and that their custom and practice is that no records are taken at such events. The Commissioner is satisfied with the submissions provided by the Ministers and she accepts that Mr Kane has been provided with all relevant information relating to the January dinner.
22. With regard to the June meeting, the Commissioner also accepts that the Ministers carried out appropriate searches of the First Minister’s email and calendar as well as the Scottish Government’s eRDM record management system. She notes that none of those searches retrieved any results.
23. The Ministers have explained that private meetings are usually marked up in the First Minister’s diary simply as “private appointment”. The Commissioner notes that the June meeting is listed in the First Minister’s public diary but is not marked up as a “private appointment”. In the circumstances, it is understandable why Mr Kane might conclude that the meeting was not, in fact, private, given that it appears on a published diary list of public meetings and appointments.
24. This question of why, if the meeting was a private appointment, it was not marked up as such in the published diary, required significant investigator time and, by necessity, had to be pursued for some time. It was only at the third time of asking that the Ministers finally explained that the June meeting was included on the published diary list by mistake.
25. The Commissioner has considered the Ministers’ submissions regarding the June meeting and she is satisfied that it was a private meeting and its inclusion on the First Minister’s list of official Ministerial engagements was a mistake. The Commissioner accepts that the Ministers hold no information regarding the June meeting.

Commissioner’s observations

26. The Commissioner’s staff had to repeatedly seek submissions from the Ministers before they explained that the June meeting had been included in the list of official engagements in error. This lack of adequate explanation by the Ministers meant that the Commissioner’s investigation in this case was needlessly extended by several weeks, increasing the time that Mr Kane has had to wait for a decision.
27. Section 17(1) of FOISA requires an authority to give notice to an applicant that it does not hold the information that has been requested. It does not require an authority to explain why

information is not held. In the circumstances, however, the Commissioner considers that it would have been good practice for the Ministers to have been more forthcoming. The explanations given to the Commissioner could also have been given to Mr Kane at either request or review. Had the Ministers told Mr Kane that the June meeting was published in the online diary by mistake, he may well have accepted this without the need for a decision from her, saving significant public resource.

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 Mr Kane.

Appeal

Should either Mr Kane 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.

Rosemary Agnew
Scottish Information Commissioner

6 July 2016

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.

...

17 Notice that information is not held

(1) Where-

(a) a Scottish public authority receives a request which would require it either-

(i) to comply with section 1(1); or

(ii) to determine any question arising by virtue of paragraph (a) or (b) of section 2(1),

if it held the information to which the request relates; but

(b) the authority does not hold that information,

it must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant notice in writing that it does not hold it.

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