

# Decision Notice



Decision 210/2013 Mr Alan Laing and the Scottish Ministers

Number of reports about the independence referendum

Reference No: 201300911

Decision Date: 16 September 2013

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**Rosemary Agnew**

Scottish Information Commissioner

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## Summary

On 4 March 2013, Mr Laing asked the Scottish Ministers (the Ministers) for the number of reports, etc. they held about the independence referendum. Following a review, the Ministers informed Mr Laing that they did not hold the information he had asked for.

Following an investigation, the Commissioner found that the Ministers had been entitled to come to this conclusion. The Commissioner also found that the Ministers failed to respond to Mr Laing's request within the required timescale.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1)(a) (Time for compliance); 17(1) (Notice that information is not held)

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

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1. On 4 March 2013, Mr Laing wrote to the Ministers and requested the following information:  
*How many interim reports, discussions papers, reports or papers have the following Scottish Government workstreams, supporting the work around the independence referendum, produced for the Scottish Government.*  
He then listed 16 separate Scottish Government workstreams, asking that the requests be interpreted as widely as possible and treated as 16 separate requests.
2. On 3 April 2013, Mr Laing requested a review on the basis that no response had been received.
3. The Ministers notified Mr Laing of the outcome of their review on 8 April 2013. They apologised for their failure to respond and informed him that they did not hold the information requested.



4. On 10 April 2013, Mr Laing 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.
5. The application was validated by establishing that Mr Laing made a request for information to a Scottish public authority and 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

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6. On 8 May 2013, the investigating officer notified the Ministers in writing that an application had been received from Mr Laing. The Ministers were given the opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions.
7. Comments were received from the Ministers on 29 May 2013 and 3 September 2013.

## Commissioner's analysis and findings

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

### Information held by the Ministers

9. 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. Section 1(6) qualifies this obligation, making it subject to other provisions of FOISA which allow authorities to withhold information or charge a fee for it. The restrictions contained in section 1(6) are not applicable in this case. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
10. In his application to the Commissioner, Mr Laing questioned the Ministers' response, which was to the effect that they did not hold the information because they were not required to maintain a running total. He believed this response to be deliberately evasive and simply a blanket refusal to answer.



11. In order to determine whether the Ministers dealt with Mr Laing's request correctly, the Commissioner must be satisfied as to whether, at the time they received Mr Laing's request, the Ministers held any information which would fall within the scope of the request.
12. As has been explained in previous decisions, FOISA provides the right of access to recorded information held by a Scottish public authority. It does not require an authority to create information in order to respond to a request for information.
13. In coming to a decision on this matter, the Commissioner has considered the Information Tribunal case *Michael Leo Johnson v the Information Commissioner and the Ministry of Justice (EA/2006/0085 13 July 2007)*, which involved a request relating to the number of cases dismissed in the High Court. (The Information Tribunal deals with appeals against decisions of the (UK) Information Commissioner made under the Freedom of Information Act 2000.)
14. In that case, as in this, the public authority had not collated the information at the time of the request. Although the Tribunal eventually concluded that the Ministry of Justice did hold the information, it commented that the degree of skill and judgement that must be applied may well have a bearing on whether the information is held or not. The Commissioner agrees with the approach taken by the Information Tribunal: a public authority will hold information if it holds the building blocks to generate the information and no complex judgement is required to produce it.
15. This means that, in considering Mr Laing's application, the Commissioner will consider whether the information requested by Mr Laing (i.e. the number of reports, etc.) can be collated without the need for any complex judgement on the part of the Ministers. If complex judgement is required, then she will conclude that the information is not held by the Ministers. On the other hand, if she is satisfied that no complex judgement is required, she will order the Ministers to count the number of reports, etc. and to provide that information to Mr Laing.
16. The Ministers accepted that where the "building blocks" are readily available, it is reasonable to expect a public authority to provide the information requested. However, in this case, they submitted that identifying the building blocks that could be considered to fall within the scope of this request is a difficult task in itself.
17. The Ministers commented that the range of papers on which Mr Laing's request focused was extremely broad. It included both formal and informal reports and papers created by workstreams, for internal use by workstreams themselves and for wider use within the organisation and for publication.
18. The Ministers submitted that deciding which reports fell within the scope of Mr Laing's request would require a sophisticated set of judgements about what constituted a "report" in the context of this request, and trying to track down how many drafts might meet the criteria of being an "interim report". They explained that the reality is that constitutional policy is not formed by a series of reports, but by a process of collaborative drafting, advice and refinement, which can generate policy answers in a variety of forms, and which can then be aggregated at a range of different levels.



19. The Ministers concluded that a significant level of skill and judgement would be required on the part of officers in each workstream to undertake a manual review of records, with subsequent retrieval and review, to identify whether potentially relevant documents might fall within the scope of the request. They further explained that trying to match any information held to the request itself is a difficult task and not one that would necessarily produce a meaningful answer.
20. The Commissioner accepts that the collation of the information requested is more complex than merely counting the documents, in that the Ministers would need to examine the documents submitted by the various workstreams in question to establish if they fell within the scope of the request. The Commissioner also accepts that in this case, the specific reference by Mr Laing about interpreting his request widely supports the Ministers' explanation of why it took such a wide approach to what information it might be necessary to examine, to enable the documents to be counted and aggregated. In the circumstances of this case, the Commissioner does not believe that the information Mr Laing has asked for can be collated without complex judgement on the part of the Ministers. She is therefore satisfied that the Ministers do not (and did not, at the time they received Mr Laing's request), for the purposes of FOISA, hold the information which would address Mr Laing's request.
21. In this regard, the Commissioner finds that the Ministers complied with Part 1 (and in particular section 17) of FOISA, by notifying Mr Laing that they did not hold the information requested.

#### **Technical issue**

22. In his application to the Commissioner, Mr Laing stated he was dissatisfied that the Ministers failed to respond to his request for information within the timescale allowed.
23. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information. This is subject to certain exceptions which are not relevant in this case.
24. Given that the Ministers did not respond to Mr Laing's request of 4 March 2013 until after he had requested a review, the Commissioner must find that they failed to respond within the 20 working days allowed by section 10(1) of FOISA.



## DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Laing.

While she is satisfied that the Ministers do not hold the information requested by Mr Laing, she finds that, by failing to respond to Mr Laing's request within the timescale laid down by section 10(1) of FOISA, the Ministers failed to comply with Part 1 of FOISA.

## Appeal

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Should either Mr Laing 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**  
**16 September 2013**



## Appendix

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### 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.
- ...

##### 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) ... the receipt by the authority of the request; or
- ...

##### 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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