

Decision Notice

Decision 165/2018: Mr X and the Scottish Ministers

Legal basis for a decision

Reference No: 201800988

Decision Date: 22 October 2018



Scottish Information
Commissioner

Summary

The Ministers were asked for the legal basis of a decision, but responded that they did not hold the information.

The Commissioner investigated and found that the Ministers had responded to the request for information in accordance with Part 1 of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections (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 20 March 2018, Mr X made a request for information to the Scottish Ministers (the Ministers). Mr X referred to previous correspondence he had received from the Justice Directorate and requested:

“(a) the legal basis for the Justice Directorate’s decision to alter the jury verdict that acquitted me of fabricated charges,

(b) the evidence upon which the Justice Directorate founds its decision I was not exonerated of these fabricated charges.”
2. The Ministers responded on 11 April 2018. For part (a) of Mr X’s request, they recognised that Mr X had been acquitted of charges against him. They stated that when considering whether an applicant is eligible for miscarriage of justice compensation, the Scottish Government is required to consider the terms of the two miscarriage of justice schemes: the statutory scheme and the ex gratia scheme. The Minister explained that decisions made in relation to both of these schemes had no bearing on the court’s decision to overturn the convictions against Mr X. For part (b) of the request, the Ministers stated that the reasons for the Justice Directorate’s decision were given in a letter from the Directorate to Mr X.
3. On 26 April 2018, Mr X wrote to the Ministers requesting a review of their decision. Mr X explained why he disagreed with Justice Directorate’s views and asked for a review from the Ministers.
4. The Ministers notified Mr X of the outcome of their review on 22 May 2018. They gave notice (in terms of section 17 of FOISA) that they did not hold any information falling within the scope of Mr X’s request. Specifically, for request (a), the Ministers stated that they did not hold any information because the Justice Directorate could not, and did not, alter the jury verdict. For request (b), the Ministers apologised that the request had not been answered in their initial response. They reiterated that they recognised that Mr X was acquitted of all charges against him at his retrial. They therefore held no evidence, documentary or otherwise, which suggested Mr X was not exonerated of the charges against him.

5. On 11 June 2018, Mr X applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr X clarified in a subsequent letter to the Commissioner of 30 July 2018 that he was dissatisfied with the outcome of the Ministers' review as he believed "the Ministers must found their assertion on concrete evidence" held: that is, that he was dissatisfied with the Ministers' "information not held" review response.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr X 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.
7. 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.
8. Mr X provided comments on 21 September 2018, and on 3 and 6 October 2018. He explained his position about the court's decision and the Justice Directorate's decision.

Commissioner's analysis and findings

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

Section 17(1) - Notice that information is 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 here. 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.
11. 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. He will also consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
12. The Ministers were asked to explain how they had established whether they held any recorded information falling within the terms of Mr X's request.
13. The Ministers replied that, for part (a) of the request, the Justice Directorate has never disputed that Mr X was acquitted of the charges against him at his re-trial and therefore has not altered the jury verdict. As the Ministers are not able to hold information on decisions they "have never actually made", they relied on section 17 of FOISA and gave notice that they did not hold any information. For part (b) of the request, the Ministers replied that the Justice Directorate has never said that Mr X was not exonerated, so the question of what evidence the Ministers hold "to found the decision that he was not exonerated simply does not come into play."

14. The Ministers believed that searches were not required to inform their response to Mr X's request as a small team of policy officials had a good knowledge of the information held in relation to the circumstances of Mr X's case. Mr X had asked for information that would confirm a view; a view that was not held by the Ministers. The Ministers would not hold information about a decision that had not been taken.
15. Having considered all the relevant submissions, the Commissioner accepts that the Ministers do not hold information falling within either part of Mr X's request. In reaching this conclusion, the Commissioner has taken into account that the information requested by Mr X relates to a specific issue with personal relevance to him, and that such information would be easily identifiable by officials who were already aware of the issue.
16. In part (a) of his request, Mr X asked for the legal basis for the Justice Directorate's decision "to alter the jury verdict that acquitted me of fabricated charges". The Commissioner accepts that the Ministers would not hold information showing a legal basis for the Justice Directorate to alter a jury verdict: the Ministers have no legal power to act in this way.
17. In part (b) of his request, Mr X sought recorded information on the evidence upon which the Justice Directorate "founds its decision I was not exonerated of these fabricated charges." Again, Mr X asked for information which would confirm his own view of the position taken by the Justice Directorate. The Commissioner accepts the Ministers' submission that the Justice Directorate has not taken the decision described by Mr X, and therefore does not hold information about this decision.
18. Taking all of the above into consideration, the Commissioner is satisfied that the Ministers do not hold any information falling within the scope of Mr X's request, and correctly gave notice of this, as required by section 17(1) of FOISA, in their review response.
19. Mr X also raised concerns about the decisions of the Justice Directorate. These do not relate to compliance with Part 1 of FOISA and are not within the remit of the Commissioner to decide upon.

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 X.

Appeal

Should either Mr X 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
Head of Enforcement

22 October 2018

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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