Decision Notice 027/2020

Analysis into Scotland's eligibility for EU membership

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 201901865

Scottish Information Commissioner

Summary

The Ministers were asked for information regarding any analysis they had carried out on Scotland's eligibility for EU membership since October 2012.

The Ministers withheld information on the basis it related to the formulation of Scottish government policy.

During the investigation, the Commissioner concluded that the Ministers had interpreted the scope of the request too narrowly.

The Commissioner required the Ministers to conduct additional searches for relevant information (using a broader interpretation of the request) and to carry out another review of their handling of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 21(4) (Review by Scottish public authority)

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 Ministers sought clarification of the request and the Applicant provided this on 16 August 2019.

2. In his request, 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 [be] "an independent European country", not an "independent country in the EU."

3. As such, he requested: :

   (i) Details of any guidance given in relation to the use of the two phrases above.

   (ii) Any correspondence between Scottish Government Ministers and Special Advisers or with European Union Institutions from October 2012 to the present day regarding Scotland's eligibility for EU membership (whether Scotland could continue to "remain" in the EU or whether the UK leaves the EU and Scotland has to reapply under the Copenhagen criteria).

   (iii) Any analysis the Scottish Government has carried out on Scotland's eligibility for EU membership since October 2012, either if Scotland could continue to "remain" in the EU or having to reapply under the Copenhagen criteria once the UK has left.

4. The Ministers responded on 6 September 2019. They notified the Applicant that they did not hold any information falling within the scope of parts (i) and (ii) of his request. The Ministers also confirmed that they did hold information falling within the scope of part (iii) of his

request, but this was being withheld under section 29(1)(a) of FOISA (Formulation of Scottish Administration policy etc.).

5. On 6 September 2019, the Applicant wrote to Ministers requesting a review of their decision on the basis that he considered the public interest favoured disclosure of the information.

6. The Ministers notified the Applicant of the outcome of their review on 1 October 2019. They upheld their previous reliance on section 29(1)(a) of FOISA, and maintained that the public interest favoured withholding the information.

7. On 9 October 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers' review because he considered that the public interest favoured disclosure of the information.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.

9. On 30 October 2019, 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.

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 to answer specific questions. These related to the Ministers' interpretation of the scope of the request and their reliance on section 29(1)(a) of FOISA.

Commissioner's analysis and findings

11. 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 him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Information covered by the Applicant's information request

12. 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.

13. Section 1(4) of FOISA provides that the information to be given to the applicant is that held by the authority at the time the request is received, as defined in section 1(4).

Searches carried out by the Ministers

14. The Ministers explained that they searched their electronic management system for key words such as "EU membership criteria", "EU accession", "Copenhagen Criteria "and "Independent country in the EU", limiting results to the time period requested. They noted that the key words were used separately and, as such, they returned a large volume of results. To process this, the case handler used a scoring system feature of their electronic management system, to identify the results with the highest score as these would be most

likely to contain information relevant to the request. These highest scoring results were then sifted, initially on title and then on content of the document.

15. In addition, the Ministers submitted that officials that were most likely to hold any further information falling within scope were asked to conduct searches of their mailboxes and individual records to identify any relevant information held, and one document was identified as falling partially within the scope of the request.

16. The Ministers acknowledged that more specific searches could have been completed using a combination of keywords to more precisely identify the relevant information and so they carried out further searches using multiple keywords such as "EU membership and analysis", "EU membership and remain", EU membership and re-apply" and "EU membership and eligibility". Apart from two exceptions, these results returned nil results, and the two exceptions contained analysis conducted by YouGov, not the Scottish Government and as such they were outwith the scope of the request.

17. The Ministers submitted that they conducted another search on "EU accession, acquis and membership" which resulted in 329 search returns. These documents were filtered by title for relevancy and the contents of the documents were searched, but the outcome was a nil return.

18. The Ministers submitted that they were satisfied that they have identified all of the information (one document) held within the scope of the request.

Submissions from the Ministers

19. The Ministers provided the Commissioner with the single document they are withholding under section 29(1)(a) of FOISA. This document comprises 22 pages, but the Ministers submitted that only pages 16 to 20 were relevant to the Applicant's request, and that the remainder of the document was outwith the scope of the request.

20. The Ministers told the Commissioner that the document was created as a draft for officials working on early policy development, dealing with sensitive matters, such as the relationship that Scotland has with international institutions and other countries. The Ministers said pages 1 to 15 and 21 to 22 are made up of text lifted from EU treaties, look at historical examples of change in membership status of other countries and include comments from public figures (such as the former President of the European Commission). In the Ministers' view, as the document does not provide their consideration of the information, provide any detailed examination, or consider how these historic examples will inform the Scottish Government's approach, the information does not fall within the scope of the request – i.e. the information does not comprise "analysis".

Commissioner's view

21. The Commissioner must consider whether the Ministers interpreted the Applicant's request reasonably. It is clear that requests must be interpreted objectively and using the plain meaning of the words. The Ministers have argued that only pages 16 to 20 include "analysis", but the Commissioner considers this to be an unreasonably narrow interpretation of the word. "Analyse" may reasonably be interpreted as considering something carefully. It does not, in the Commissioner's view, in the everyday meaning of the word, necessarily include a detailed examination leading to a recommended approach; it may simply include a product of research or a review of the issues involved.

22. The Commissioner notes that the introductory paragraphs describe the document as providing an "assessment". In this case, there appears to be little to differentiate between "assessment" and "analysis."

23. In any event, pages 1 to 15 and 21 to 22 do not simply contain text lifted from EU treaties, etc.: they describe and comment on the routes by which other countries may have gained or are trying to gain EU membership and whether or not such an option would be open to Scotland. The Commissioner cannot see how this can be interpreted as anything other than "analysis".

24. The Commissioner notes that this single document is the only information that the Ministers have identified as falling within the scope of the Applicant's request. Given the Ministers' narrow interpretation of the term "analysis", the Commissioner is not satisfied that the Ministers will have identified all relevant information falling within the scope of the request, particularly given the subject matter and timeframe of the request.

25. He therefore requires the Ministers to undertake new searches, taking into account a less narrow definition of "analysis" (see paragraphs 21 and 22).

26. The Commissioner will not consider the Ministers' reliance on section 29(1)(a) in this case, as he is not satisfied that all relevant information has been identified. In the event that the Applicant is dissatisfied with the review carried out by the Ministers, a further application may be made to the Commissioner.

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant. The Ministers failed to identify all of the information covered by the Applicant's request. In doing so, they failed to comply with section 1(1) of FOISA.

The Commissioner therefore requires the Ministers to:

- provide the Applicant with a new review outcome
- provide the Commissioner with evidence that they have carried out searches for information falling within the scope of the Applicant's information request (taking a broader interpretation of "analysis")

The Ministers have to do this by 23 March 2020.

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.

Enforcement

If the Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Minsters have failed to comply. The Court has the right to inquire into the matter and may deal with the Ministers as if they had committed a contempt of court.

Margaret Keyse
Head of Enforcement

5 February 2020

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.

…

21 Review by Scottish public authority

…

(4) The authority may, as respects the request for information to which the requirement relates-

(a) confirm a decision complained of, with or without such modifications as it considers appropriate;

(b) substitute for any such decision a different decision; or

(c) reach a decision, where the complaint is that no decision had been reached.

…

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