

# Decision Notice

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## Decision 092/2019: Ms Samantha Kerr and the Scottish Ministers

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### Scrutiny of inter-agency discussions

Reference No: 201900416

Decision Date: 05 June 2019



Scottish Information  
Commissioner

## Summary

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The Ministers were asked about the independent scrutiny and oversight of any decisions taken within an inter-agency discussion. The Ministers maintained that no information was held.

The Commissioner investigated and was satisfied that the Ministers did not hold the information requested.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (information 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

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1. On 16 December 2018, Ms Kerr made a request for information to the Scottish Ministers (the Ministers). Ms Kerr requested information regarding the scrutiny and oversight of inter-agency discussions referring to inter-agency discussions that had taken place between West Lothian Council, Police Scotland and other agencies.
2. The Ministers responded on 17 January 2019. They referred Ms Kerr to various other agencies, but did not provide a specific response to her information request.
3. On 18 January 2019, Ms Kerr wrote to the Ministers requesting a review of their decision on the basis that they had not provided her with the information she had requested.
4. The Ministers responded to Ms Kerr with the outcome of their review on 4 February 2019. The Ministers gave Ms Kerr notice, under section 17(1) of FOISA, that they did not hold the information she had requested.
5. On 6 March 2019, Ms Kerr wrote to the Commissioner. Ms Kerr applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms Kerr stated she was dissatisfied with the outcome of the Ministers' review because they had not answered her questions. Ms Kerr also indicated that she did not accept that the Ministers did not hold the information she had requested.

## Investigation

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6. The application was accepted as valid. The Commissioner confirmed that Ms Kerr 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. On 26 April 2019, the Ministers were notified in writing that Ms Kerr 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 to answer specific questions. In particular, the Ministers were asked for details of the searches and enquiries they had carried out in order to identify and locate relevant information.

## **Commissioner's analysis and findings**

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

### **Is relevant information held by the Ministers?**

10. 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, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
11. The information to be given is that held by the authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. 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.
12. Ms Kerr submitted that, although the Ministers claimed they did not hold the information she had requested, she had asked a very simple question that is underpinned by legislation and policy that is developed by the Scottish Government. Ms Kerr argued that it was disingenuous for the Ministers to claim they do not hold this information, as they are the source of the legislation and policy provided to other agencies.
13. The Ministers submitted that they do not hold any information falling within the scope of Ms Kerr's information request.
14. The Ministers explained that they had given Ms Kerr notice of this fact in their email of 4 February 2019. In that same email, the Ministers advised Ms Kerr that West Lothian Council, Police Scotland or the Crown and Procurator Fiscal Service might be able to help with her request, and they had provided her with details of how to contact each of these organisations. The Ministers also provided Ms Kerr with an extensive explanation of how inter-agency referral discussions (IRDs) work, with web links to online guidance for further information.
15. The Ministers noted that IRDs do not of themselves have legal personality. Each agency involved in an IRD has its own compliance and governance procedures to adhere to. West Lothian Child Protection Committee (which is not a Scottish public authority for the purposes of FOISA) should have its own guidelines on independent scrutiny and oversight of decision making in IRDs that fall within its remit.
16. The Ministers submitted that the Scottish Government does not regulate or directly participate in IRDs, but officials working in the area of child protection policy have a detailed understanding of how they operate. This understanding enabled the Ministers to provide Ms Kerr with such a detailed explanation in their email of 4 February 2019, even though they do not hold the recorded information that was requested.

17. The Ministers submitted that they had searched the following guidance and legislation in order to identify information that fell within the scope of Ms Kerr's information request:
  - (i) National Child Protection Guidance for Scotland (2014)
  - (ii) Protecting children and young people; Child Protection Committee and Chief Officer responsibilities (2005)
  - (iii) Police and Fire Reform (Scotland) Act 2012
  - (iv) Children's Hearings (Scotland) Act 2011
18. The Ministers searched the above documents using a number of search terms including, "statutory duties", "inter-agency discussions", "IRDs", "scrutiny" and "decision making". The Ministers submitted that they had provided the results of these searches in the response issued to Ms Kerr on 4 February 2019.
19. The Ministers also searched their corporate electronic records management system (eRDM) using the same search terms and they provided the Commissioner with evidence of the results.
20. 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 it does not hold the information.
21. Ms Kerr has argued that the Ministers must have some oversight of IRD decision making as they are underpinned by legislation and policy that is developed by the Scottish Government.
22. The Commissioner has considered the arguments put forward by the Ministers. He is satisfied that the Ministers have provided sufficient evidence to show that they do not hold any information regarding the scrutiny or oversight of the inter-agency discussions referred to by Ms Kerr. The Ministers provided details of the searches they conducted and they clearly explained the role of IRDs and the responsibilities for their governance. The Ministers explained that the Scottish Government does not have any involvement in IRDs and it does not have any responsibility pertaining to the accountability of scrutiny of the IRD process.
23. The Commissioner acknowledges the counter arguments put forward by Ms Kerr, but as noted above, the information an applicant expects an authority to hold cannot be equated with the information an authority actually holds.
24. The screen shots provided by the Ministers clearly demonstrate the range of searches that were undertaken along with the negative outcome of those searches. The Commissioner considers these searches to be both thorough and proportionate.
25. Given the submissions and responses received from the Ministers, the Commissioner is satisfied that the Ministers took adequate steps to establish what information was held in this case and that, on the balance of probabilities, they do not hold the information requested by Ms Kerr. The Ministers were therefore correct to give her notice, in terms of section 17(1) of FOISA, that they did not hold the information requested.

## Decision

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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 Ms Kerr.

## Appeal

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Should either Ms Kerr or the Scottish 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**

**05 June 2019**

### 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.

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- (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.

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#### 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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