

# Decision Notice 080/2022

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## Grant and loan funds to Scottish Rugby

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**Applicant: The Applicant**

**Public authority: Scottish Ministers**

**Case Ref: 202100887**



Scottish Information  
Commissioner

## Summary

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The Ministers were asked about grants and loans to Scottish Rugby. The Ministers disclosed some information, but the Applicant believed the Ministers held more information. He was also unhappy with the time taken to respond and with the way the Ministers informed him of his appeal rights.

The Commissioner found that the Ministers had failed to comply fully with FOISA in responding to the request. They had not identified all the information falling within the request when the request was received, had responded late and failed to inform the Applicant of his appeal rights appropriately.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(4) (General entitlement); 10(1) Time for compliance; 21(10) (Review by Scottish public authority); 25(1) (Information otherwise accessible)

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 26 March 2021, the Applicant requested from the Scottish Ministers (the Ministers) the following information.
  - The terms applied by the Scottish Government to the grant and loan funds made available to Scottish Rugby Union Limited (Scottish Rugby) comprising £15 million in grants and £5 million in loan funding. (Part 1)
  - A copy of the conditional missive agreed between the Scottish Government and Scottish Rugby for these funds. (Part 2)
  - Copies of any correspondence such as letters, minutes, emails, attachments or otherwise on the decisions to allocate this emergency funding to Scottish Rugby from the period of 1 September 2020 to 26 March 2021. (Part 3).
2. On 27 April 2021, having not received a response to his request, the Applicant wrote to the Ministers requesting a review.
3. The Ministers notified the Applicant of the outcome of their review on 11 May 2021. For parts 1 and 2 of the request, they supplied the loan agreement given to Scottish Rugby. For part 3, they informed the Applicant that he had already received the information under FOISA. They specified the reference number of their previous response to him. The following day, the Ministers, apparently in error, sent the Applicant a second review outcome, apologising for the failure to respond to his request on time.
4. On 22 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that he was dissatisfied with the outcome of the Ministers' review in relation to parts 1 and 3.
5. For Part 1, the Applicant commented that he had asked for documentation on the grant and loans provided to Scottish Rugby, but had only been supplied with the loan document. He added that Scottish Rugby had publicly declared that the loan agreement they signed was

not the document that was sent by the Ministers. The Applicant supplied a minute from the Scottish Rugby Council and the document referred to in the Scottish Rugby minute that was said to be signed on the 28 January 2021.

6. The Applicant did not believe he had been provided with all of the information held for part 3. He commented that: "no minutes, emails or attachments were provided based on the award of £20M of public money" and he found the absence of information "difficult to comprehend".
7. The Applicant also said that he was dissatisfied with the Ministers' failure to respond to his initial request and the failure to advise him of his right to appeal to the Commissioner in their notice of 12 May 2021.

## **Investigation**

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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. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 26 October 2021, the Ministers were invited to comment on this application and to answer specific questions.
10. The Ministers replied, but also said they would issue a revised response to the Applicant. They did so on 9 November 2021 and supplied an additional document that fell within part 1 of the request.
11. Having received a revised response, the Applicant was asked by the investigating officer if he wished a decision to be issued by the Commissioner. The Applicant confirmed that he did, commenting that the additional disclosure had raised even more questions, such as why there had been radical changes to different versions of the document.
12. In further correspondence with the investigating officer, the Applicant advised that he would make a further information request to the Ministers. He did not raise any concern at the redaction of personal data by the Ministers in their additional response to him of 9 November 2021.

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

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13. In coming to a decision on this matter, the Commissioner considered all 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.

### **Section 1 - General entitlement**

14. 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, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.
15. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not usually require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. from a person's memory).

16. As noted above, the Applicant was dissatisfied with the Ministers' response to parts 1 and 3 of his request.

*Part 1: terms applied to the grant and loan funds*

17. The Applicant requested the terms applied by the Scottish Government to the grant and loan funds made available to Scottish Rugby. He said he had asked for documentation on the grant and loans, but had only been supplied with the loan document. He added that Scottish Rugby had publicly declared that the loan agreement they signed was not the document disclosed by the Ministers. The Applicant supplied a minute from the Scottish Rugby Council and the document referred to in the Scottish Rugby minute was said to be signed on the 28 January 2021. The Ministers were asked by the investigating officer to comment on this.
18. The Ministers replied that they had now identified one additional document that would fall within part 1 of the request: a letter from Scottish Rugby dated 27 January 2021 and signed on 28 January 2021. They apologised that this information was not identified when responding to the Applicant's request or review. The Ministers supplied a copy to the Applicant on 9 November 2021 with a small amount of personal information redacted, and they explained the redactions to the Applicant. (The Ministers supplied an un-redacted copy of this document to the Commissioner.)
19. Given that this information falls within part 1 of the request and was not provided to the Applicant initially or at review, the Commissioner must find that the Ministers failed to comply fully with part 1 in their response to this part the Applicant's request.

*Part 3: correspondence*

20. In part 3 of his request, the Applicant requested any correspondence - such as letters, minutes, emails, attachments or otherwise - on the decisions to allocate this emergency funding to Scottish Rugby from the period of 1 September 2020 to 26 March 2021. The Applicant was not satisfied with the Ministers' response as he believed he had not been provided with all the requested information.
21. The Ministers were asked to comment. The Ministers advised that, having considered this part of the request further, they had identified that one additional document falling within the scope of this request. Although the document had been disclosed to the Applicant in relation to a separate request, the Ministers did not wish to rely on section 25(1) of FOISA in relation to this document as the information had not been "otherwise accessible" to the Applicant when he made this request on 26 March 2021. They therefore provided a redacted copy of this document to the Applicant in their revised response of 9 November 2021. Again, they redacted a small amount of personal data. They also removed some information which fell outwith the scope of this request because it does not relate to the decisions to allocate emergency funding to Scottish Rugby. (The Ministers supplied an un-redacted copy of this document to the Commissioner.)
22. Given that this information falls within part 3 of the request and was not provided to the Applicant initially or at review, the Commissioner must find that the Ministers failed to comply fully with Part 1 of FOISA in responding to this part the Applicant's request.

*Searches*

23. The Ministers explained how they had ascertained what information they held falling within the scope of the request. They specified the specific files searched and the search terms used. These keyword searches returned 28 documents, which were sifted to determine if any were in scope. Some documents were discounted by the document name, but where this

was not appropriate, they opened and reviewed the returns individually to assess whether the information held fell within scope. This identified one further document, in addition to the information already identified.

24. 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.
25. Having considered all relevant submissions, the Commissioner accepts that, by the end of the investigation, the Ministers had taken adequate and proportionate steps to establish the recorded information held that falls within the scope of parts 1 and 3 the Applicant's request. In reaching this conclusion, the Commissioner has considered the information supplied and the searches now conducted.

### **Timescales**

26. The Applicant said that he was dissatisfied with the Ministers' failure to respond to his initial request.
27. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information. This is subject to qualifications which are not relevant in this case. It is a matter of fact that the Ministers did not provide a response to the Applicant's request for information within 20 working days, so the Commissioner finds that they failed to comply with section 10(1) of FOISA.

### **Appeal rights**

28. The Applicant also said that he was dissatisfied with the Ministers' failure to advise him of his right to appeal to the Commissioner. As noted above, the Ministers issued two separate review responses to the Applicant, one on 11 May 2021 and the other on 12 May 2021. The Ministers confirmed, during the investigation, that this was an error.
29. Having carried out a review, a Scottish public authority must give the applicant notice in writing (section 21(5)). The notice must (section 21(10)) contain particulars about the right to apply to the Commissioner for a decision and of the right to appeal to Court of Session.
30. The email of 11 May 2021 incorrectly told the Applicant that he had the right to ask the Ministers to carry out an internal review, following which he could apply to the Commissioner. The email of 12 May 2021 notified the Applicant of his right to apply to the Commissioner, but not of his subsequent right to appeal to the Court of Session. Therefore, neither of the responses complied with section 21(10) of FOISA.
31. The Commissioner notes that this was an error and that the Ministers subsequently contacted the Applicant (28 June 2021) apologising for the error.

### **Decision**

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The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply fully with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Minister failed to comply with Part 1 by failing to:

- identify all the information that fell within parts 1 and 3 of the request
- respond within the statutory timescales and
- inform the Applicant accurately of his rights of appeal.

Given that the Ministers have apologised for these failings and have conducted a review that supplies the remaining information, the Commissioner does not require the Ministers to take any action in respect of this failure in response to the Applicant's application.

## **Appeal**

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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.

**Daren Fitzhenry**  
**Scottish Information Commissioner**

**20 July 2022**

## Appendix 1: Relevant statutory provisions

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### 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) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
- (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

#### 21 Review by Scottish public authority

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- (10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

#### 25 Information otherwise accessible

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

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