

Decision Notice

Decision 066/2017: Mr Ritchie Reid and the Scottish Ministers

Scotland's offshore boundary

Reference No: 201700277
Decision Date: 4 May 2017



Scottish Information
Commissioner

Summary

The Ministers were asked for information about the decision to move the Scottish offshore boundary north. The Ministers told the requester that they did not hold the information.

After investigation, the Commissioner accepted that the Ministers did hold not any information falling within the scope of the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections (FOISA) sections 1(1) and (4) (General entitlement); 10(1) (Time for compliance); 17(1) (Notice that information is not held); 21(1) and (4)(c) (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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 27 October 2016, Mr Reid made a request for information to the Scottish Ministers (the Ministers). The request related to an alleged "deal" between Donald Dewar and Gordon Brown to move the Scottish offshore boundary north, "thereby shifting a number of oil fields from Scotland waters to England". Mr Reid asked for:
...any held details of this "deal" and for any available statistics which detail the loss in revenue to Scotland due to this move annually, or alternatively, an explanation for the creation of the new border and why it is not challenged by the current Scottish Government.
2. The Ministers failed to respond to this request.
3. On 4 January 2017, Mr Reid wrote to the Ministers requesting a review, as they had failed to comply with his request within 20 working days.
4. The Ministers notified Mr Reid of the outcome of their review on 18 January 2017. They gave Mr Reid formal notice under section 17(1) of FOISA that they did not hold the information he had requested. The Ministers indicated that they would send Mr Reid a separate letter explaining the Scottish Government's position regarding the offshore boundary (this was also sent on 18 January 2017).
5. On 10 February 2017, Mr Reid applied to the Commissioner for a decision in terms of section 47(1) of FOISA. He was dissatisfied with the outcome of the Ministers' review because of the length of time it had taken and the content of the response. Mr Reid also questioned whether the review had been handled correctly.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr Reid made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. On 2 March 2017, the Ministers were notified in writing that Mr Reid had made a valid application. The case was then 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 answer specific questions including justifying their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

9. 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 her by both Mr Reid and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Section 17 – information 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, subject to qualifications which are not applicable in this case. Under section 17(1), where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect.
11. In this case, the Ministers gave notice to Mr Reid that they did not hold the information requested concerning the redesignation of Scotland's offshore boundary. They explained that gas and oil statistics are produced using the 1999 boundary, and that they do not hold statistics which detail any loss of revenue to Scotland compared to an alternative boundary.
12. Mr Reid also asked why the new border is not challenged by the current Scottish Government. The Ministers told him that they did not hold any relevant information on this point because (contrary to the premise behind his request) they *had* raised concerns about it with the UK Government.
13. The Ministers provided Mr Reid with background information relating to both parts of his request. In their review response of 18 January 2017, they advised Mr Reid that National Records Scotland (NRS) might hold information about discussions relating to the maritime boundary prior to devolution. In addition, the Ministers noted that legislation concerning the maritime boundary (The Scottish Adjacent Waters Boundaries Order 1999 (the 1999 Order)) was passed by the UK government and they advised Mr Reid that he could find a record of the relevant parliamentary debate in Hansard (links to online content were provided).
14. This background information did not satisfy Mr Reid. In his submissions to the Commissioner, he argued that his information request had not been answered and that the information he had been given (in a separate letter) bore no relevance to the question he had asked.

15. Mr Reid noted that in the parliamentary debate¹ to which he was referred, it was stated that “The boundary provided by the draft order had particular significance for sea fisheries... the boundary has no relevance to the regulation of oil and gas exploration and production at sea, since these are reserved matters”. Mr Reid stated that he simply wanted to know whether the oil fields affected by the boundary change are now in Scottish or English waters. If, as it seemed, there was no evidence of the Scottish Government challenging the boundary change [in relation to oil fields moving from Scottish to English waters], he would like this to be acknowledged.

Searches carried out by Ministers

16. The Ministers were asked how they established that they did not hold any information falling within the scope of Mr Reid’s request for information. The Ministers submitted that it was clear (from the terms of Mr Reid’s request) that any relevant documents would have been held before devolution and as such would have been transferred to NRS as a matter of course. The Ministers had contacted NRS, which had provided various files, but none of them fell within the scope of the request. The Ministers noted that they provided Mr Reid with a link to the NRS catalogue as there may have been other information listed there of interest to him.
17. The Ministers then proceeded to check their own records. They explained that there were a considerable number of files to be checked. They sent emails requesting searches to be undertaken by the oil and gas team, the Office of the Chief Economist, Scottish Government legal colleagues and by Marine Scotland. The Ministers also searched their eRDM (electronic records and document storage system) using a variety of key words related to the request. A list of these key words was provided to the Commissioner, who is satisfied that the search terms were relevant to the request.
18. These searches showed that the Ministers did not hold any information about the “deal” between Gordon Brown and Donald Dewar, nor did they hold any information about a “loss in revenue to Scotland”. The Ministers provided the Commissioner with the responses to the email enquiries they had sent, which confirmed that no information had been identified by the relevant staff. The Ministers maintained they were correct to give notice to Mr Reid that they did not hold the information specified in his request.
19. Regarding Mr Reid’s request for an explanation as to the creation of the new boundary and why it has not been challenged by the current Scottish Government, the Ministers argued that the boundary *had* been challenged. They submitted that the 1999 Order defines the boundary of Scottish waters for all purposes, not only oil and gas. They referred to the two letters they had provided to Mr Reid, which show that the Scottish Government wrote to the UK Government in 2009 and 2015 to challenge the boundary.
20. The Commissioner accepts that the 1999 Order defines the boundary of Scottish waters for all purposes, but she notes that neither of the two letters made mention of oil or gas resources or revenues. While the Commissioner can accept that previous Scottish Governments challenged the boundary set out in the 1999 Order, she does not consider that these challenges were raised with reference to the potential impact on oil and gas resources and revenues.
21. In addition, while the Commissioner acknowledges that the SNP was the political party in government in 2009 and 2015, the *current* Scottish Government took office in May 2016. The

¹ <http://hansard.millbanksystems.com/lords/1999/mar/23/scottish-adjacent-waters-boundaries>

Commissioner cannot accept that letters from 2009 and 2015 show that the current Scottish Government has challenged the boundary.

22. On the evidence presented to her, the Commissioner has concluded that the Ministers do not hold information showing that the current Scottish Government has challenged the boundary as regard its impact on Scotland's oil and gas resources, or showing why such a challenge has not been made by the current Scottish Government.
23. The Commissioner has considered the searches carried out by the Ministers and she is satisfied that they were thorough and relevant. She concludes that the Ministers were factually correct to give Mr Reid notice, under section 17(1) of FOISA, that they did not hold the information he had requested, although she disagrees with the Ministers' reasoning in relation to information about challenges made about the boundary by the current Scottish Government.

Compliance with timescales

24. 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.
25. It is a matter of fact that the Ministers did not provide a response to Mr Reid's request for information within 20 working days, so the Commissioner finds that they failed to comply with section 10(1) of FOISA.
26. The Ministers have since apologised to Mr Reid for this failure.
27. The Ministers explained that on receipt of the request they considered that it might be responded to quickly, with a query to NRS. However, there was a delay in receiving the information from NRS and then it became apparent that Scottish Government teams also had to be contacted to search for information.
28. The Ministers noted that they had not identified Mr Reid's wider question about "not challenging the boundary" early in the process and this oversight delayed the completion of their initial response. The Ministers explained that as there was a need to secure information and advice from a number of areas within the Scottish Government, further delays were caused by the necessary contact, discussions and clearances and they submitted that this clashed with the Christmas leave period. Staff absence had also been a factor in the delay: the Ministers had hoped the response could be progressed in the absence of the leading official; however a number of questions arose over that period which required the official's detailed knowledge of the case and therefore no progress was made until their return to work.
29. The Commissioner notes the reasons put forward for the delay in responding, but observes that Mr Reid's request was made almost eight weeks (or 40 working days) before the Christmas leave period began. The additional delays caused by festive annual leave could have been avoided if the Ministers had responded timeously to Mr Reid's request when it was received.

Section 21 – Review by Scottish Public Authority

30. In his application to the Commissioner, Mr Reid noted that he had requested a review on 4 January 2017, but the only response that he had received was the Ministers' email of 18 January 2017, which appeared to be a response to his initial request and not his request for

review dated 4 January 2017. He complained that the Ministers had not carried out a review, as requested.

31. Mr Reid indicated that he had raised this issue with the Ministers, who had responded that although his request for review had been submitted on 4 January 2017, it was not received by the reviewer until after the response to his request was issued on 18 January 2017. The Ministers considered that their response of 18 January 2017 should therefore be treated as a combined response to Mr Reid's initial request and his request for review.
32. Mr Reid queried how the Ministers' response of 18 January 2017 could be a response to his request for review when the Ministers had acknowledged that they had not received his request for review by that date.
33. The Commissioner notes that the Ministers' response of 18 January 2017 makes no reference to Mr Reid's email of 4 January 2017, in which he asked them to conduct a review of their failure to respond to his request. In addition, the email of 18 January 2017 was clearly intended as an initial response to Mr Reid's request as it provides information on how to seek a review if he was unhappy with the response.
34. The Commissioner understands why Mr Reid may be concerned that the Ministers have "skipped" the review stage and also why he considers that the Ministers' response of 18 January 2017 was not a response to his requirement for review of 4 January 2017. However, the Commissioner upholds the Ministers' view that their email of 18 January 2017 must be considered as the outcome of their review. The Ministers failed to respond to Mr Reid's initial request within 20 working days. Therefore, when Mr Reid submitted his request for review on 4 January 2017, it meant that the Ministers no longer had the opportunity to do so: instead, they were required to respond to the requirement for review within twenty working days (section 21(1) of FOISA).
35. The Ministers have acknowledged that, although they received the request for review on 4 January 2017, it was not received or seen by the relevant official until after that person had written to Mr Reid on 18 January 2017.
36. Section 74(2)(b) of FOISA states that "a thing transmitted by electronic means is presumed to be received on the day of transmission". This means that, regardless of how the Ministers process or internally distribute the emails they receive, they received Mr Reid's requirement for review on 4 January 2017.
37. The Commissioner is satisfied that the Ministers' response of 18 January 2017 should be considered as their review response, as by that time Mr Reid had already requested a review and his request for review had been received by the Ministers. She is therefore satisfied that the Ministers' review response was issued within the 20 working days required by section 21(1) of FOISA and met the requirements of section 21(4) of FOISA. The email of 18 January 2017 complied with section 21(4)(c) of FOISA, in reaching a decision where the complaint was that no decision had been reached.

Decision

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

The Commissioner finds that by correctly notifying Mr Reid that they did not hold the information he had requested, the Ministers complied with section 17(1) of FOISA.

However, by failing to respond to Mr Reid's request within 20 working days, the Ministers failed to comply with section 10(1) of FOISA.

The Commissioner does not require the Ministers to take any action in respect of this failure in response to Mr Reid's application.

Appeal

Should either Mr Reid 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
Acting Scottish Information Commissioner

4 May 2017

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.

...

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.

...

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.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

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

...

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

...

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