

Decision Notice



Decision 150/2013 Mr James Hunter and the Scottish Ministers

Correspondence with HRH The Prince of Wales on the constitution of the United Kingdom

Reference No: 201200928
Decision Date: 25 July 2013

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Summary

On 16 January 2012, Mr Hunter asked the Scottish Ministers (the Ministers) for details of correspondence between the First Minister and other Ministers of the Scottish Government and the Prince of Wales on the Constitution of the United Kingdom and the status of the Monarchy in the United Kingdom in an independent Scotland. The Ministers did not respond. Following Mr Hunter's request for review, the Ministers refused to confirm or deny whether they held any such correspondence.

Following an investigation, the Commissioner found that the Ministers had been entitled to refuse to confirm or deny whether they held the correspondence Mr Hunter had asked for.

The Commissioner also found that the Ministers failed to comply with sections 10(1) and 21(1) of FOISA by failing to respond to the requests for information and a review within statutory timelimits.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 10(1) (Time for compliance); 18 (Further provision as respects responses to requests); 21(1) (Review by Scottish public authority); 41(a) (Communications with Her Majesty etc. and honours)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 16 January 2012, Mr Hunter wrote to the Ministers requesting the following information:
“the details of correspondence between The First Minister and other Ministers of the Scottish Government and HRH The Prince of Wales (Prince Charles, Duke of Rothesay) in the period May 2007 to December 2011 on the matter of the Constitution of the United Kingdom and how Scotland is affected, and the matter of the status of the Monarchy in the United Kingdom and its future in an independent Scotland.”



2. Mr Hunter did not receive a response from the Ministers and, on both 29 February 2012 and 10 April 2012, wrote to the Ministers requesting a review of their decision on the basis that he had not received a reply to his request.
3. The Ministers responded by letter dated 15 April 2012 (which Mr Hunter received postmarked 16 May 2012 – see paragraph 4 below). The Ministers gave Mr Hunter a notice under section 18(1) of FOISA. Section 18(1) allows Scottish public authorities to refuse to reveal whether information exists or is held by them, where, if the information did exist and was held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt from disclosure under one or more of the exemptions listed in section 18(1) and if the authority considers that to reveal whether the information exists or is held would be contrary to the public interest.
4. On 8 May 2012, Mr Hunter wrote to the Commissioner, stating that he was dissatisfied that the Ministers had not responded to his requirement for review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Hunter subsequently received the Ministers' review notice postmarked 16 May 2012 and later made a new application to the Commissioner, expressing dissatisfaction with the delays in responding and with the Ministers' reliance on section 18(1) of FOISA.
5. The application was validated by establishing that Mr Hunter had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

Investigation

6. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
7. Submissions were received from the Ministers on 9 July 2012, 4 September 2012, 19 November 2012 and 18 June 2013. The submissions of 4 September, 19 November 2012 and 18 June 2013 were sought by the Commissioner to clarify the Ministers' arguments on section 18. Mr Hunter was also invited, on 28 May 2013 and 16 July 2013, to provide any further submissions he wished. On 22 July 2013, Mr Hunter responded to the invitation to give his view on section 18 and on the public interest with respect to his request.



Commissioner's analysis and findings

8. In coming to a decision on this matter, the Commissioner considered all the relevant submissions, and parts of submissions, made to her by both Mr Hunter and the Ministers. She is satisfied that no matter of relevance has been overlooked.

Approach

9. Section 18(1) of FOISA gives public authorities the right to refuse to reveal whether information exists or is held by them in certain limited circumstances. These circumstances are as follows:
- a request has been made to the authority for information which may or may not be held by it;
 - if the information existed and was held by the authority, the authority could give a refusal notice under section 16(1) of FOISA on the basis that the information was exempt information by virtue of any of the exemptions in sections 28 to 35, 38¹, 39(1) or 41 of FOISA; and
 - the authority considers that to reveal whether the information exists or is held by it would be contrary to the public interest
10. It is not sufficient simply to claim that one or more of the relevant exemptions applies: section 18(1) makes it clear that a public authority must be able to give a refusal notice under section 16(1) on the basis that the information is exempt information. In this case, the Ministers submitted that, if the requested information existed and was held by them, it would be exempt from disclosure under section 41(a) of FOISA. Given that section 41(a) is not an absolute exemption for the purposes of section 2(2) of FOISA, it is only by satisfying a dual test that the information can be considered to be exempt information. That dual test is:
- (i) finding that the exemption in section 41(a) applies and
 - (ii) having carried out the public interest test required by section 2(1)(b) of FOISA and then having found the public interest to lie in maintaining that exemption
11. The Commissioner will first consider whether the Ministers could have given a refusal notice under section 16(1) in relation to the information, if it existed and was held.
12. It should be noted that, where a public authority has relied on section 18(1) of FOISA, the Commissioner's decision must not state whether the information requested actually exists or is held by the authority. As such, this limits the Commissioner in setting out her full reasons for coming to her decision.

¹ Section 38 was added to the exemptions listed in section 18(1) on 1 May 2013 by the Freedom of Information (Scotland) Act 2013.



Section 41(a) Communications with Her Majesty etc. and honours

13. In terms of section 41(a) of FOISA, information is exempt information if it relates to communications with Her Majesty, with other members of the Royal Family or with the Royal Household.
14. Prince Charles is a member of the Royal Family. As such, the Commissioner accepts that the correspondence Mr Hunter has requested, if held, would constitute exempt information.

Section 2(1)(b) - the public interest test as it applies to section 41(a)

15. The exemption in section 41(a) is subject to the public interest test in section 2(1)(b) of FOISA.
16. The Ministers set out in some detail their views on the public interest in their submission of 4 September 2012. However, it was unclear to the Commissioner from those submissions which of their arguments related to the public interest test in section 2(1)(b) (as it related to the section 41(a) exemption) and which of their arguments related to the public interest referred to in section 18(1). The Commissioner acknowledged there may be some overlap, inasmuch as arguments applicable to the public interest test for section 41(a) may also be applicable to section 18(1), but she expects authorities to be clear about what arguments apply to which public interest test under consideration. The Commissioner therefore asked the Ministers to clarify:
 - (i) the factors they took into account in determining, in line with section 2(1)(b), that, in all the circumstances of the case, the public interest in disclosing the information (if held) was outweighed by the public interest in maintaining the exemption (i.e. the public interest test in relation to the application of section 41(a)); and
 - (ii) the factors they took into account in concluding that to reveal whether the information existed or was held would be contrary to the public interest (i.e. the public interest test in relation to the application of section 18).
17. The Ministers subsequently re-worked their public interest arguments to differentiate, as far as possible, between the two.
18. The following are the factors the Ministers stated they took into account in determining, in line with section 2(1)(b), that, in all the circumstances of the case, the public interest in disclosing the correspondence (if held) would be outweighed by the public interest in maintaining the exemption and withholding the correspondence (again, if held).
19. In favour of disclosure, the Ministers acknowledged that there was a public interest in:
 - disclosing information as part of open, transparent and accountable government and to inform public debate
 - enabling people to understand how and why the Scottish Government communicates with the Royal Family or Household, or with other authorities and stakeholders about Royal matters, and how those communications relate to Government decisions or actions.



20. The Ministers commented that these public interests factors will often be met by information which is routinely published by the Scottish Government when any announcement or statement about a policy or a decision is made (although no examples of such announcements or statements were provided).
21. The Ministers submitted the following against disclosure:
 - There is a vital public interest in allowing the Ministers a private space within which to engage in full and frank discussions with the Royal Family or Household on constitutional matters. Such discussion makes for better quality and better informed decisions. Premature disclosure of correspondence (if any existed or were held) would be likely to undermine those full and frank discussions, which in turn would undermine the quality of the decision-making process in relation to matters relating to, or affecting, the Royal Family. It could also damage the relationships between the Scottish Government and the Royal Family, which would not be in the public interest.
 - There is a strong public interest in ensuring that the Monarch and the Heir to the Throne are kept informed with regard to the introduction of legislation by the Scottish Government to ensure awareness of issues and to allow for consideration of any impact that legislation may have on the interests of the Royal Family and their responsibilities. There is also a strong public interest in maintaining relationships between the Royal Household and the Scottish Government and in maintaining private space to support this relationship.
22. The Commissioner agrees with the Ministers that there would be a public interest in disclosure of the correspondence Mr Hunter has asked for (should it exist and be held by the Ministers) as such information would contribute to openness and accountability, and would assist in informing the public how the Ministers engage with the Royal Household and Prince Charles in respect of the status of the Monarchy and the UK Constitution.
23. As the Commissioner has said in a previous decision, *Decision 111/2012 Catherine Stihler MEP and the Scottish Ministers*², the Commissioner is aware that the Scottish Government is committed to a referendum on the matter of Scottish independence. In her view, the constitutional status of the Sovereign and the Royal Family in respect of an independent Scotland could have a bearing on how people vote in the referendum.
24. Disclosure of any such information could lead to more informed public understanding of the effect on the constitutional position of an independent Scotland and on the status of the Monarchy.
25. However, the Commissioner agrees with the Ministers' submission about the importance of allowing the Ministers and the Royal Household to communicate about constitutional matters that may affect the status of the Monarchy. The Commissioner acknowledges that there is a strong public interest in allowing a private space within which the Ministers can engage in full and frank discussions with the Royal Family or Household on constitutional matters. In this case, the Commissioner has concluded that this is a stronger public interest than in disclosure of the correspondence, if held.

² <http://www.itpublicknowledge.info/applicationsanddecisions/Decisions/2012/201101968.asp>



26. On balance, therefore, the Commissioner considers that, if the information existed and were held, the public interest in maintaining the exemption in section 41(a) would outweigh the public interest in the disclosure of the information.
27. The Commissioner is therefore satisfied that, if the correspondence existed and was held by them, the Ministers would have been entitled to give a refusal notice under section 16(1) of FOISA.
28. The Commissioner is now required to go on to consider the public interest in terms of section 18(1) of FOISA, i.e. whether the Ministers were entitled to conclude that revealing whether the correspondence exists or is held would be contrary to the public interest.

Section 18 - Further provision as respects responses to requests (whether to neither confirm nor deny information is held)

29. The Ministers explained to the Commissioner why they considered that revealing whether the correspondence exists or is held by them would be contrary to the public interest.
30. In favour of disclosure, similar to the arguments put forward on the public interest test in section 2(1)(b), the Ministers acknowledged that there is always a public interest in disclosing information as part of open, transparent and accountable government, and to inform public debate. Similarly, there was also some public interest in enabling people to understand how and why the Scottish Government communicates with the Royal Family or Household, or with other authorities and stakeholders about Royal matters, and how those communications relate to Government decisions or actions. The Ministers commented that these factors will often be met by the information that is routinely published by the Scottish Government when any announcement or statement about a policy and/or a decision is made.
31. The Ministers submitted the following against disclosure:
 - To consider disclosure of what would, if it existed, be the Prince's personal data, a strong public interest argument would be required for undermining the Prince's privacy interests. Given that the UK Information Commissioner (the ICO) has found that there is a strong public interest in maintaining the privacy of the Prince's communications with UK Ministers, the Ministers concluded that it would be wrong to suggest that there would be a stronger public interest in disclosing communications with Scottish Government.
 - There is a particular public interest in maintaining good relations between the Scottish Government and the Royal Family and Household and in protecting the free exchange of information and in protecting a channel of communication between the Scottish Government, and the Royal Family and Royal Household. Disclosing the fact that communications had (or had not) taken place on a particular issue would be likely to mean that future communications would be less open and less frequent, with less exchange of information. The Ministers concluded there could be no public interest in disclosing information which would damage that relationship and disrupt future communications.



- There is a vital public interest in maintaining the long-standing constitutional Convention that both the content and the fact of correspondence between the Queen and the Government is confidential. This Convention is an adjunct of the right of the Queen to be consulted by her Government, and to advise, encourage and to warn as the circumstances require. The rights of the Queen could not be exercised effectively without this expectation of confidentiality and, if the content of these consultations became known, it may serve to undermine the appearance of the political neutrality of the Queen.
- As part of the Scottish Government's protocol arrangements with the Royal Household, Ministers contacted representatives of the Royal Household to inform them about the request. The Royal Household took the view that a request specifically focusing on subjects that might be raised by the Prince of Wales with the First Minister (or any other Government officials or Ministers) would qualify as the Prince's private correspondence and that confirming whether such correspondence exists could disclose that the Prince holds strong personal views on a particular topic and in turn would breach the first data protection principle in the Data Protection Act 1998 (the DPA). Conversely, acknowledging that information is not held would in time identify cases where the Prince had not made representations and it could be inferred that he agreed with projects on which he had not commented.
- To deviate from the preferred option of the Royal Household neither to confirm nor deny the existence of correspondence could lead the Scottish Government being considered to be less supportive of the Monarchy (the Ministers confirmed that this is not the case).
- There is a well-established constitutional doctrine that the Heir to the Throne has a right and duty to be instructed in the business of government in preparation for the time when he will be King. His instruction in the rights that he will exercise as Monarch also depends on the confidentiality and privacy of his communications with Government, which are subject to an expectation of confidence analogous to the Convention of confidentiality that exists between the Sovereign and Government. The purpose of this is to maintain the perception, which reflects the actuality, that the Monarch and, by analogy, the Heir, are above party politics. The Ministers advised the Commissioner that the Prince of Wales knows that the decisions he takes about whether to correspond on any topic and with whom are protected; no unwarranted inference can be drawn from the existence or absence of correspondence with any individual member of the Government or from the existence or absence of correspondence on a particular topic. Removal of this protection would restrain the Prince of Wales from raising some matters for fear that his views, or even the knowledge that he had expressed his views to a member of the Government, would ignite controversy. He would be prevented from discharging his duties as Heir to the Throne by the threat that publicity would undermine the perception of political neutrality, a foundation of the constitution.
- Only a uniform approach of using the principle of neither confirm nor deny could ensure that the Prince's rights under the DPA are upheld.



- The Ministers also referred to the Commissioner's *Decision 039/2011 Mr Dominic Kennedy of The Times and the Scottish Ministers*³. Although that decision involved the Environmental Information (Scotland) Regulations (the EIRs), and in particular regulations 11(2) and (6), the Ministers commented that the Commissioner had emphasised there that “*had the topics mentioned in... [the] request not been ones on which the Prince of Wales had spoken publicly... there would be considerably less weight to the legitimate interest in establishing whether correspondence had been exchanged*”. The Ministers highlighted that, in the present case, although in the context of section 18 of FOISA rather than the EIRs, the topic that is the subject matter of Mr Hunter's request was not one on which the Prince of Wales has spoken publicly, and therefore “*there would be considerably less weight to the legitimate interest in establishing whether correspondence had been exchanged*”.
32. During the investigation, Mr Hunter made additional comments about the interpretation of section 18 in which he expressed his strong concern about its use by the Ministers and urged the Commissioner to order the Ministers to confirm whether or not they held the correspondence he had requested.
 33. As stated above, the Commissioner considers there is a specific public interest in disclosure of information which would increase the public's understanding of how the Scottish Government engages with the Royal Family and the Royal Household, and in the circumstances of this case, the Heir to the Throne. The Monarchy has a central role in the British Constitution and the public is entitled to know how the various elements of the constitution operate.
 34. Mr Hunter made his request at a time when the constitutional future of the UK and, in particular, the constitutional future of Scotland and its relationship with the rest of the UK, was (and still is) under discussion. The Commissioner considers there is a public interest in allowing the public to understand what (if any) correspondence has taken place in respect of Scotland's constitutional future, particularly where such correspondence may have taken place between Prince Charles and the Scottish Government. Additionally, there is a general public interest in understanding which subjects Prince Charles, as Heir to the Throne, does (or does not) communicate to Government.
 35. The Commissioner also agrees with the Ministers (as above) that there is a public interest in maintaining good relations between the Scottish Government and the Royal Family and Household and in protecting the free exchange of information and the channel of communication between the Scottish Government, and the Royal Family and Royal Household.
 36. In conclusion, the Commissioner is satisfied that, were the Ministers to reveal whether any information falling within Mr Hunter's request existed or was held by them, that would have the effect advanced by the Ministers in their submissions; this would be contrary to the public interest.

³ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201000570.aspx>



37. Having considered the matter in detail, the Commissioner is satisfied that the Ministers were entitled to conclude, in terms of section 18(1) of FOISA, that revealing whether the correspondence requested by Mr Hunter exists or is held would be contrary to the public interest. As a result, the Commissioner is satisfied the Ministers were entitled to refuse to confirm or deny, in line with section 18(1) of FOISA, whether they held the information requested by Mr Hunter.

Procedural breaches

Initial information request

38. 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, subject to certain exceptions which are not relevant in this case.
39. The Ministers apologised for the delay in responding to Mr Hunter's initial request; they advised that the relevant staff member was on leave and that the request was not immediately identified as an information request. The Ministers explained that those responsible for responding to the request had since reviewed this case for lessons to be learned in the future and had familiarised themselves with the appropriate guidance.
40. The Commissioner notes the Ministers' points, but it is a matter of fact that they did not provide a response to Mr Hunter's request for information within 20 working days. Therefore, the Commissioner finds that they failed to comply with section 10(1) of FOISA.

Request for a review

41. Section 21(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the requirement to comply with a requirement for review, subject to certain exceptions which, again, are not relevant in this case.
42. The Ministers explained that when Mr Hunter submitted his initial request for review on 29 February 2012, the request was identified and work was undertaken to provide the review response. Due to the nature of this request, this necessitated searches of the records to identify whether any relevant correspondence had taken place. Discussion also took place with Ministers, Special Advisers and the Royal Household, and this took longer than normal.
43. The Ministers explained that the date of the review letter was an unfortunate drafting error; the date of a previous draft letter date had not been updated. The Ministers confirmed that the letter was issued on 16 May 2012.
44. The Ministers did not provide a response to Mr Hunter's requirement for review within 20 working days; therefore, the Commissioner finds that they failed to comply with section 21(1) of FOISA.
45. The Commissioner would also add the observation that, taking the two breaches together, the total time taken to provide any sort of response to the request in this case was unacceptable.



DECISION

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

The Commissioner finds that the Ministers were entitled to refuse to confirm or deny, in terms of section 18 of FOISA, whether the correspondence requested by Mr Hunter exists or is held by them.

The Commissioner also finds that the Ministers failed to comply with sections 10(1) and 21(1) of FOISA. As the Ministers issued a response on 16 May 2012, the Commissioner does not require them to take any action in relation to these procedural breaches.

Appeal

Should either Mr Hunter or the Scottish Ministers wish to appeal against this decision, there is an 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.

Rosemary Agnew
Scottish Information Commissioner
25 July 2013



Appendix

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.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

2 Effect of exemptions

- (1) To information which is exempt information by virtue of any provision of Part 2, section 1 applies only to the extent that –
- ...
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.
- ...

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.



...

18 Further provision as respects responses to requests

- (1) Where, if information existed and was held by a Scottish public authority, the authority could give a refusal notice under section 16(1) on the basis that the information was exempt information by virtue of any of sections 28 to 35, 38, 39(1) or 41, but the authority considers that to reveal whether the information exists or is so held would be contrary to the public interest, it may (whether or not the information does exist and is held by it) give the applicant a refusal notice by virtue of this section.
- (2) Neither paragraph (a) of subsection (1) of section 16 nor subsection (2) of that section applies as respects a refusal notice given by virtue of this section.

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.

...

41 Communications with Her Majesty etc. and honours

Information is exempt information if it relates to-

- (a) communications with Her Majesty, with other members of the Royal Family or with the Royal Household; or

...