

Decision Notice

Decision 202/2018: Mr T and the Scottish Ministers

Undercover policing in Scotland

Reference No: 201801243

Decision Date: 11 December 2018



Scottish Information
Commissioner

Summary

The Ministers were asked about the Scottish Government's decision not to order an inquiry into undercover policing in Scotland. The Ministers withheld information under a number of exemptions, including section 29(1)(a) of FOISA (formulation or development of government policy). At review, the Ministers were asked to reconsider their reliance on section 29(1)(a) of FOISA alone.

Following an appeal to the Commissioner, the Ministers disclosed some information but applied new exemptions to information they had previously withheld under section 29(1)(a) of FOISA.

The Commissioner found that the Ministers had failed to comply with section 1(1) of FOISA when responding to the request. The Commissioner requires the Ministers to carry out a new 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(1) and (4)(b) (Review by Scottish public authority); 47(1)(a) (Application for decision by Commissioner)

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 2 February 2018, Mr T made a request for information to the Scottish Ministers (the Ministers). He requested all information regarding a potential inquiry into undercover policing in Scotland and the Scottish Government's decision not to order an independent Scottish inquiry.
2. The Ministers did not respond until 5 April 2018. In their response, they referred Mr T to some information that was publicly available and they withheld the remaining information under a range of exemptions:
 - (i) sections 29(1)(a) and (b) (Formulation of Scottish Administration policy etc.);
 - (ii) sections 30(a), 30(b)(i) and (ii), 30(c) (Prejudice to effective conduct of public affairs) of FOISA;
 - (iii) section 36(1) (Confidentiality) of FOISA and
 - (iv) section 38(1)(b) (Personal information) of FOISA.
3. On 11 April 2018, Mr T wrote to the Ministers requesting a review of their decision, solely in relation to the information they were withholding under section 29(1)(a) of FOISA. Mr T asked for more explanation as to why the public interest test did not favour disclosure of this information.
4. The Ministers notified Mr T of the outcome of their review on 24 May 2018. They maintained their reliance on section 29(1)(a) of FOISA, and they explained again why, in their view, the public interest test favoured maintaining the exemption.

5. On 24 July 2018, Mr T applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr T was dissatisfied with the outcome of the Ministers' review because he believed it was in the public interest for the information to be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr T 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 5 September 2018, the Ministers were notified in writing that Mr T had made a valid application. The Ministers were asked to send the Commissioner the information withheld from Mr T. The Ministers provided the information 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 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 him by both Mr T and the Ministers. He is satisfied that no matter of relevance has been overlooked.

Scope of the investigation

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.
11. In his request for review, Mr T challenged the Ministers' application of section 29(1)(a) of FOISA, requiring them to elaborate on why the exemption applied and why they had concluded that the public interest favoured upholding the exemption. Although the Ministers had relied on a number of exemptions to withhold information from Mr T, in his request for review Mr T expressed dissatisfaction only with the decision to withhold information under section 29(1)(a) of FOISA. This means that the Commissioner can only consider the decision to withhold information under section 29(1)(a) (see section 47(1)(a) of FOISA). The Commissioner cannot reach a decision on any other exemptions, as these were not challenged in Mr T's request for review.
12. The Ministers applied the exemption in section 29(1)(a) of FOISA to 82 documents. Of these, 65 documents were withheld solely under section 29(1)(a) of FOISA, while the remaining 17 documents were withheld under section 29(1)(a) of FOISA and one or more of the other exemptions cited by the Ministers.
13. During the investigation, Mr T agreed that the Commissioner's investigation should exclude information from the 17 documents withheld under more than one exemption, and that it should be limited to the 65 documents withheld solely under section 29(1)(a) of FOISA.

Information disclosed during the investigation

14. The Ministers were questioned about their reliance on section 29(1)(a) of FOISA and were asked to provide the Commissioner with detailed reasons for applying the exemption and for maintaining that the public interest favoured disclosure.
15. The Ministers subsequently disclosed some of the information they had been withholding under section 29(1)(a) of FOISA. In the covering letter to Mr T, the Ministers explained that they had reconsidered the information previously withheld from him under section 29(1)(a) of FOISA and were now able to release some additional information to him. The Ministers told him that some of the information that was previously withheld under section 29(1)(a) of FOISA was now being withheld under the exemptions in sections 38(1)(b) and 30(c) of FOISA and they had redacted this information from the disclosed documents.
16. In a separate email, the Ministers confirmed to the Commissioner that they were no longer seeking to rely on the exemption contained in section 29(1)(a) of FOISA to withhold any information. They apologised for the delay in disclosing information to Mr T at such a late stage. The Ministers noted that they had identified lessons to take forward when applying this exemption in the future.

Commissioner's conclusions

17. Mr T's sole dissatisfaction in this case was the Ministers' application of the exemption in section 29(1)(a) of FOISA. As a result, the Commissioner's investigation is limited to determining whether or not the Ministers properly applied the exemption contained in section 29(1)(a) to the withheld information. The Commissioner cannot investigate any of the other exemptions relied on by the Ministers as they were not the basis of Mr Finlay's dissatisfaction in his requirement for review.
18. As the Ministers have now withdrawn their reliance on section 29(1)(a) of FOISA, the Commissioner must conclude that they wrongly applied this exemption to the withheld information and failed to comply with the requirements of section 1(1) of FOISA.
19. While the Ministers have disclosed some information to Mr T, they have also applied new exemptions to some of the information previously withheld under section 29(1)(a) of FOISA. Mr T has not had the opportunity to challenge this decision. The Commissioner therefore requires the Ministers to carry out a new review of their handling of Mr T's request and (in terms of section 21(4)(b) of FOISA) substitute a different decision.

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 Mr T.

The Ministers wrongly withheld information under section 29(1)(a) of FOISA. Some of this information was disclosed during the Commissioner's investigation, but by failing to provide the information when responding to Mr T's request, the Ministers failed to comply fully with section 1(1) of FOISA.

As the Ministers have now applied different exemptions to some of the information they were previously withholding under section 29(1)(a) of FOISA, the Commissioner requires the Ministers to carry out a new review of their handling of Mr T's information request and to substitute a different decision by **25 January 2019**.

Appeal

Should either Mr T 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 Ministers 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

11 December 2018

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

- (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-

...

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

...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with –
(a) a notice given under section 21(5) or (9); or

...

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.

...

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