



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2023] CSIH 46  
XA10/23

Lord President  
Lord Pentland  
Lord Boyd of Duncansby

OPINION OF THE COURT

delivered by LORD PENTLAND

in the appeal under section 56 of the Freedom of Information (Scotland) Act 2002

in the cause

THE SCOTTISH MINISTERS

Appellants

against

THE SCOTTISH INFORMATION COMMISSIONER

Respondent

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**Appellants: Mure KC; Reid KC; Scottish Government Legal Directorate**  
**Respondent: Johnston KC; Anderson Strathern LLP**

6 December 2023

**Introduction**

[1] This appeal against a decision of the Scottish Information Commissioner raises a sharp and important question of statutory interpretation: what does it mean for a public authority to “hold” information for the purposes of the Freedom of Information (Scotland)

Act 2002? A public authority is only obliged to disclose information which it holds. The Scottish Ministers contend that they do not hold information which is stored in a restricted access area of the Scottish Government's document management systems used by Mr James Hamilton, one of the Independent Advisers on the Scottish Ministerial Code. The Commissioner has held that they do. The dispute arises from Mr Hamilton's investigation into whether the former First Minister, the Right Honourable Nicola Sturgeon MSP, breached the Scottish Ministerial Code, and a subsequent Freedom of Information Request by a member of the public for the written evidence on which Mr Hamilton's report was based.

[2] At a hearing on the Summar Roll on 6 December 2023 we were addressed by senior counsel for the parties. At the conclusion of the hearing we refused the appeal. We now provide reasons for our decision.

## **Background**

### *Events leading to Ms Sturgeon's self-referral to an independent adviser on the Scottish Ministerial Code*

[3] On 18 November 2014, the Right Honourable Alex Salmond MSP resigned as First Minister. Nicola Sturgeon succeeded him.

[4] In December 2017, the Scottish Government adopted a new procedure entitled "Handling of harassment complaints involving current or former ministers". Its purpose was to fill a perceived gap in the existing complaints procedure, namely the absence of any mechanism for handling such complaints against former ministers. A key aspect of the new procedure was the exclusion of the First Minister from any involvement in a complaint against a former minister.

[5] Not long after allegations of sexual misconduct were made against Alex Salmond in 2018, the then First Minister, Nicola Sturgeon, was accused of breaching the Scottish Ministerial Code by allegedly: (i) failing to disclose to her private ministerial office the basic facts of a series of meetings and telephone conversations between her and Mr Salmond (and his Chief of Staff, Geoff Aberdein) in the period from 29 March to 18 July 2018; (ii) attempting to influence the conduct of the investigation taking place under the procedure following those meetings; (iii) misleading the Scottish Parliament by failing to disclose a meeting between her and Geoff Aberdein, on 29 March 2018 in a Parliamentary statement she made about the meetings on 8 January 2019; and (iv) failing to comply with the law in respect of the Scottish Government's response to Mr Salmond's judicial review of the complaints procedure.

[6] Ms Sturgeon referred herself for investigation by Mr Hamilton on 13 January 2019. The referral had to be paused to avoid any risk of prejudice to the criminal proceedings against Mr Salmond. Following the conclusion of those proceedings (in which Mr Salmond was acquitted of all charges), there was a further delay in progressing the referral because the Scottish Government's main focus was on the response to the Covid-19 pandemic.

*The terms of the referral to Mr Hamilton*

[7] In a written answer given to the Scottish Parliament on 3 August 2020 the Deputy First Minister, the Right Honourable John Swinney MSP, set out the detailed terms of the referral to Mr Hamilton. He referred to the provision in the Code stating that the First Minister might refer matters to the independent advisers to provide him or her with advice on which to base his or her judgement about any action required in respect of ministerial conduct. The Code said that the findings of the independent advisers would be published.

[8] The remit was in the following terms.

- “1. Review any relevant documentation relating to the meetings and discussions listed above.
2. Interview any Minister or official of the Scottish Government, including Special Advisers, who may have any knowledge of the facts and content of the meetings and discussions, to assess whether the Ministerial Code is engaged and, if so, whether the terms of the Code have been complied with.
3. Interview any relevant person outwith the Scottish Government, including the former First Minister, Alex Salmond, who may have information relating to the facts and content of the meetings and discussions.
4. Determine if there is any evidence that the First Minister attempted to use information discussed during those meetings and discussions to influence the conduct of the investigation being undertaken by the Permanent Secretary into allegations made against Mr Salmond under the Procedure.
5. Provide the Deputy First Minister with a report setting out the findings and conclusions with regard to:
  - i. whether the Ministerial Code is engaged regarding the meetings and discussions;
  - ii. whether there has been any breach of the Code and the nature of any such breach; and
  - iii. if a breach has occurred, advice on the appropriate remedy or sanction.
6. The Independent Adviser is further invited to consider and offer views on whether the Ministerial Code might need revision to reflect the terms of the Procedure and the strict limitations it places on the involvement of the First Minister in cases which fall to be considered under the Procedure.”

*Steps taken by the Scottish Government in relation to the referral*

[9] A number of civil servants from the Scottish Government were seconded to form a secretariat to provide Mr Hamilton with administrative support in the course of his investigation. In establishing the secretariat it was explained to those concerned that Mr Hamilton’s role was independent of the government. Responsibility for overseeing the referral was delegated by the First Minister to the Deputy First Minister. Members of the secretariat were to report to Mr Hamilton and not to ministers or to their normal line

managers. They were directed that it was of the highest importance that they took all necessary steps to protect Mr Hamilton's independence and the confidentiality of his inquiry. In particular, documents seen or prepared, such as Mr Hamilton's draft report, were not to be shared outside the secretariat without express authorisation.

### *Mr Hamilton's report*

[10] Having carried out his investigation, Mr Hamilton submitted his report to the Deputy First Minister on 22 March 2021. For present purposes it is not necessary to set out the details of Mr Hamilton's findings. In short he concluded that in his opinion Ms Sturgeon had not breached the provisions of the Scottish Ministerial Code in respect of any of the issues referred to him for investigation. The Scottish Ministers redacted certain parts of the report to ensure compliance with orders made by the court in the criminal proceedings for protection of the identities of the complainers. They then published it on the Scottish Government's website.

### *The Freedom of Information request*

[11] A short time after publication of Mr Hamilton's report, a member of the public, Mr Benjamin Harrop, made a request under the Freedom of Information (Scotland) Act 2002 to the Scottish Ministers for all of the written evidence submitted to Mr Hamilton as part of his investigation. This was to include evidence from the First Minister, her Chief of Staff and any other individuals within the Scottish Government who had submitted evidence. The Scottish Ministers responded to the request on 13 May 2021. They declined to disclose the information on the grounds that: (1) information held by or on behalf of an independent adviser such as Mr Hamilton was not within the scope of FOISA; (2) section 25(1) of FOISA exempted from disclosure any information that was already published on their and the

Scottish Parliament's websites; and (3) section 30(c) of FOISA exempted from disclosure any information which was prejudicial to effective conduct of public affairs, and disclosure of the written submissions, particularly so soon after the publication of the report, would be likely to undermine the credibility and authority of the report.

[12] Mr Harrop sought a review of that decision. The Scottish Ministers upheld their original decision, subject to one modification: the information requested which was contained in Mr Hamilton's report was exempt under section 25(1) as it had already been published. Mr Harrop next appealed to the Scottish Information Commissioner.

#### **The Scottish Information Commissioner's decision**

[13] The critical question was not whether Mr Hamilton, as an independent adviser, was to be regarded as a separate entity, but whether any information held by Mr Hamilton was held by the Ministers for the purposes of s 3(2) of FOISA. In order to determine whether an authority held information, a number of factors required to be considered, including: whether the information had an appropriate connection with the public authority in that it was for the purposes of carrying out the authority's functions as a public authority (*University of Newcastle upon Tyne v Information Commissioner* [2011] UKUT 185 (AAC); *Graham v Scottish Information Commissioner* 2020 SC 199); the content of the information; the circumstances in which it was created; and how it was held.

[14] The First Minister had instructed the referral to Mr Hamilton. Its purpose was to provide the Deputy First Minister with advice on which to base a judgement about any action required in respect of ministerial conduct. The referral was instructed for the purpose of investigating and advising as to whether the First Minister had breached the Code.

[15] Compliance with the Scottish Ministerial Code was a matter in which the Ministers had a collective interest. The referral and its associated investigation were instructed and carried out, evidence was obtained, and the report produced, for the purpose of considering whether the First Minister's conduct complied with the Code and advising on appropriate sanctions if it did not. Information was obtained and created for that purpose. This amounted to an appropriate connection with the Scottish Ministers such that the information was held by them for the purposes of section 3(2) of FOISA.

[16] Although the investigation was stated to be subject to "Ministerial Oversight", it was made clear that secretariat staff should not disclose information outside the secretariat. This factor did not affect the Commissioner's view that the information was held by the Scottish Ministers. The secretariat staff worked for the Ministers. Any restrictions on information security or disclosure imposed on them had been imposed by more senior government officials. The restrictions could be lifted by the same or other officials. In other words there was nothing in the restrictions which bound the Ministers. They chose to impose them and they could lift them.

[17] While there might be circumstances where a restriction on access to information had the effect that the information was not held by the authority, that was not the position in the present case. For essentially the same reasons an agreement reached with the secretariat that the investigation materials should be held by Mr Hamilton rather than by the authority did not affect the answer as to whether on a proper construction of section 3(2) the authority held the information.

[18] At the conclusion of his investigation Mr Hamilton provided a report to the Deputy First Minister. It was evident from a note which Mr Hamilton asked to be published alongside the redacted report that the decision as to what information should be redacted

from the report prior to its publication lay with the Ministers, not with Mr Hamilton or the secretariat.

[19] The Commissioner concluded that the information gathered by Mr Hamilton, and/or his secretariat, for the purposes of his investigation was held by the Ministers. This did not, however, mean that the information would be disclosed. The right to information under section 1(1) of FOISA was not absolute; the Ministers relied on the exemption in section 30(c) to withhold information. The Commissioner considered that the Ministers had, however, failed to identify all of the information they held which fell within the scope of the request. They, therefore, required to provide a new response to Mr Harrop. The Commissioner could not reach a view on whether the Ministers were entitled to rely on the section 30(c) exemption (which was subject to a public interest test) until he was satisfied that they had identified all the information covered by the applicant's request held by them.

### **Relevant provisions of the Freedom of Information (Scotland) Act 2002**

[20] Section 1 of FOISA creates a general entitlement for a member of the public, on request, to receive information held by a Scottish public authority:

*"Right to information*

#### **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."

Section 3(2) defines what is meant by "held by an authority" as follows:

#### **"3 Scottish public authorities**

...

(2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held—



- (a) by the authority otherwise than—
  - (i) on behalf of another person; or
  - ...
- (b) by a person other than the authority, on behalf of the authority.”

[21] The general entitlement to information is subject to certain exemptions. Section 1 only applies to information to the extent that it is not covered by an absolute exemption or, in all the circumstances of the case, the public interest in disclosing the information is not outweighed by the public interest in maintaining the exemption (s 2(1)(a) and (b)).

[22] In relation to Mr Harrop’s request, the Ministers relied on the exemptions set out in section 25(1), an absolute exemption, and section 30(c), which reads:

**“25 Information otherwise accessible**

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

...

**30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act—

- (a) would, or would be likely to, prejudice substantially the maintenance of the convention of the collective responsibility of the Scottish Ministers;
- (b) would, or would be likely to, inhibit substantially—
  - (i) the free and frank provision of advice; or
  - (ii) the free and frank exchange of views for the purposes of deliberation; or
- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.”

**The Scottish Ministers’ submissions**

[23] The appeal concerned only the first issue, which is of a preliminary nature: whether the Ministers held the information. The Commissioner had erred in determining that they did. In reaching that conclusion, he had taken into account irrelevant considerations and

misinterpreted applicable case law. He had reached a conclusion that no reasonable tribunal could reach.

[24] FOISA should be interpreted in a manner consistent with the desirability of making information available to the public, in the interests of promoting open, transparent and accountable government. That was the policy of the Act (*Graham*, para 15). This involved interpreting the Act's provisions according to their natural and ordinary meaning. The word "held" was not used in a technical sense (*University of Newcastle upon Tyne*, paras 23 and 27).

[25] Information held by a public authority on behalf of someone else was outside the scope of FOISA, section 1, if it was held solely on behalf of that other person. If it was held to any extent on behalf of the public authority, it was held by that authority for the purposes of FOISA (*University of Newcastle upon Tyne*, para 21; *Graham*, para 18). The mere location of information on an authority's premises did not engage section 1 in the absence of an appropriate connection between the information and the authority. Each piece of information had to be judged separately in order to determine whether it was "held" (*Department of Health v Information Commissioner* [2017] 1 WLR 3330), para 54).

[26] On a common sense application of these principles, it was clear that the written evidence provided to Mr Hamilton's investigation was not held by the Ministers otherwise than on behalf of Mr Hamilton. Nor was it held by Mr Hamilton on behalf of the Ministers. Mr Hamilton acted independently of the Ministers at all times. The independent nature of his role and the arrangements put in place for him to discharge it meant that he had to be regarded as being separate from the Ministers. This principle had been stressed at every stage of the investigation process.

[27] It was for Mr Hamilton alone to decide on the contents of his report and the advice given in it. Ministers had no control over these matters. Mr Hamilton was solely responsible for decisions relating to retention of information generated during his investigation and for liaising with National Records of Scotland on questions of permanent preservation of documents. Scottish Ministers were only entitled to receive Mr Hamilton's report, not any of the information gathered by him in pursuance of his investigation. Such an approach served to encourage cooperation with the investigation by third parties, including civil servants.

[28] Given the *ad hoc* nature of his services to the Ministers, it was perfectly reasonable for Mr Hamilton to be provided with an *ad hoc* secretariat and IT support. The fact that, as a matter of form, information relating to Mr Hamilton's investigation was stored on and managed via the Scottish Government's IT systems should not detract from the fact that, as a matter of substance, access to the information was restricted to Mr Hamilton and his secretariat. It was a fanciful suggestion, at best theoretical, to suggest that the Ministers could or would gain access to it. The email inboxes of some of the members of the secretariat could be accessed by others, but as a matter of fact, those inboxes were not accessed except on one occasion. No emails relating to the investigation were seen by anyone besides the secretariat.

[29] It could not be correct to say that information gathered by an independent body charged with investigating a public authority was also held by that authority. Such a conclusion would sit uneasily with the independence of the investigator. The Ministers were only entitled to receive, and only did receive, the report, not the underlying material which informed it. They had no interest in receiving that material. For them to receive the material would be destructive of Mr Hamilton's independence. The investigation was not

subject to ministerial oversight in any substantial respect. The Commissioner had misunderstood the documents provided to him about this. The Deputy First Minister had oversight of the referral in the sense that it may have given rise to the need for a ministerial decision on matters such as the level of resourcing of the secretariat; he did not have oversight of the conduct of the investigation to any degree. The fact that the members of the secretariat remained civil servants while working on the investigation did not mean that the information was held by the Ministers. Neither did the Government's role in redacting the report. Whether there was an appropriate connection between information and an authority depended upon the context, facts and circumstances of the case. On the facts here, there was no appropriate connection.

### **The Commissioner's submissions**

[30] The appeal ought to be refused. The question whether a public authority held information was fundamentally a factual one (Coppel, *Information Rights* (6<sup>th</sup> ed), para 20-009). "Held" was an ordinary word in the English language. It was not used in a technical sense in the legislation. It had to be interpreted having regard to the purpose of the legislation, which was to make information available to the public. There should be no scope for the introduction of technicality or of unnecessary legal concepts which were calculated to over-complicate matters and restrict the disclosure of relevant information (*Graham*, para 15).

[31] Whether information was held for the purposes of section 3(2) of FOISA depended upon whether there was an appropriate connection between the information and the authority (*University of Newcastle upon Tyne*, paras 54 – 57). The relationship between the Ministers and Mr Hamilton was just one factor to be considered in reaching a conclusion on

that issue. It was not a question of whether information could be shared with the Ministers, but whether they held it. The distinction drawn by the Ministers between the report on the one hand and the underlying material on the other was unduly formalistic. The fact that, upon their review of the request, the Ministers pointed out that some of the information requested was included in paragraph 10.8 of the report showed that there was no neat dividing line between the report and the material. The Ministers were aware of the content of this evidence.

[32] In order to answer the question of whether the Ministers held the information, certain factors were of particular relevance: (i) an appropriate connection with the public authority; (ii) the circumstances in which the information was created; (iii) whether the authority had read, edited, relied upon or otherwise made use of the information; (iv) the legal relationship between the authority and the person who had the information; (v) the authority's knowledge that a person is holding information for it; (vi) any restrictions on the authority's access to the information; and (vii) the location of the information.

[33] Consideration of these factors showed that the Ministers held the information. The report was instructed by the First Minister, who was the ultimate judge of the consequences of a breach of the Scottish Ministerial Code. The entire system was designed to ensure compliance with the Code. The Ministers had a collective interest in that aim. This was not a case where the public authority had no connection with information which was by chance within its systems or premises. An appropriate connection existed. The fact that the information related to the Ministers' non-statutory functions was of no relevance.

[34] The Scottish Government had provided Mr Hamilton with a secretariat. The investigation was subject to ministerial oversight, at least in the sense that the Deputy First Minister was responsible for taking decisions in relation to the sound administration of the

referral. The information was held in the Scottish Government's document management systems. A number of people within the Scottish Government had access to the report and had redacted it in order to remove some of the information Mr Hamilton had obtained in the course of the investigation. The report was published by the Scottish Government on its website. All of these factors pointed to the conclusion that the Ministers held the information.

[35] It would be a clear threat to the efficacy of FOISA if a public authority could remit a matter to an independent adviser or expert and thereby exclude information from the scope of the legislation. It was of the greatest importance that such arrangements, however well intentioned, should not have such an effect. The meaning of "held" in section 3(2) should not be over-complicated to restrict disclosure; a range of exemptions existed to protect good administration.

[36] There may be cases in which a public authority's access to information was restricted such as to justify the conclusion that the authority did not hold that information. This was not such a case. The Scottish Government was not bound by the access restrictions. It imposed the restrictions and it could lift them. The Ministers' argument that this suggestion was fanciful did not address the point. The effect of their submission about the access restrictions was that a public authority could subject itself to such restrictions and thereby exclude information from the purview of FOISA. That would substantially undermine the efficacy of the regime. The public's entitlement to information should depend upon the applicability of any relevant exemptions. The determination of whether the information was held was only the first stage of the necessary analysis in this case. The Ministers had asserted exemptions. That was the framework within which the disclosure, or not, of this information ought to be assessed.

### **Analysis and decision**

[37] In *Graham v Scottish Information Commissioner* 2020 SC 199 the Second Division of the Inner House accepted that, consistent with the policy of the Freedom of Information (Scotland) Act 2002, words and expressions used in the Act should, so far as possible, be given their ordinary and natural meaning (para [15]). The policy underlying FOISA is the desirability of making information available to the public, in the interests of promoting open, transparent and accountable government. There should be no scope for the introduction of technicalities and unnecessary legal concepts calculated to over-complicate matters. Such an approach would be liable to restrict the disclosure of information in ways that run counter to the clear legislative policy.

[38] Given the clear underlying policy of the legislation it follows that a crucial aim of FOISA was to avoid technical and legalistic disputes about whether a public authority holds information. There is no difference on this issue between the Freedom of Information Act 2000 (applicable in England and Wales) and FOISA.

[39] Whether information is or is not held by a public authority is fundamentally a question of fact. Sophisticated legal analysis of the meaning of the concept of 'holding' information is neither necessary nor appropriate (Coppel, *Information Rights*, 6<sup>th</sup> ed para 20-009). Technicalities which can arise in some similar areas of the law, for example the law of disclosure with its somewhat narrow distinctions between a document in the power, custody or possession of a person, simply do not apply to the question of whether information is or is not held by an authority (*University of Newcastle upon Tyne v Information Commissioner* [2011] UKUT 185 (AAC) at para 28; Coppel, *ibid*).

[40] It is nonetheless the case that mere physical possession of information does not amount to holding the information; there has to be an appropriate connection between the information and the authority so that it can be properly said that the authority holds the information (*University of Newcastle upon Tyne* paras 23, 24, 27 and 28). Thus, for example, an authority could not be said to hold contact details of friends stored on an employee's personal phone while he is working in the authority's premises and happens to have the phone with him.

[41] It is clear from his decision that the Commissioner fully understood the law on what was intended by the concept of holding information and that he correctly applied the law to the facts and circumstances of the case. He recognised, in particular, that the issue did not revolve around an interpretation of the arrangements made for Mr Hamilton's independence from the Scottish Government, but turned instead on the narrower question of whether the information was held by the Scottish Ministers. While the Commissioner referred in para 21 of his decision to "the information which Mr Hamilton holds", this was not a material error. It is clear from his decision read as a whole that the Commissioner was well aware that the information was held on the Scottish Government's IT systems; see for example para 20 of his decision.

[42] The Commissioner gave full and detailed consideration to whether there was an appropriate connection between the information and the Ministers, the content of the information, the circumstances in which it was created, and how it was held. In adopting this approach the Commissioner did not err in law; the factors to which he referred were all properly germane to the question as to whether the Ministers held the information.

[43] The Commissioner properly had regard to the fact that the First Minister instructed the referral and that its purpose was to provide the Deputy First Minister with advice on



which to base his decision as to whether any action was required under the Scottish Ministerial Code. The steps taken to establish Mr Hamilton's independence from the Scottish Government while he was carrying out his investigation were perfectly proper, but they are of no real significance when it comes to addressing the different issue of whether the Ministers held the information at the time of the request. The investigation and the information generated by it were components of or stages in what was essentially an internal decision-making process conducted by the Ministers in the context of determining whether the Scottish Ministerial Code had been breached. The Ministers' submissions seek to attach disproportionate weight to Mr Hamilton's independence; they fail to acknowledge the wider context in which the investigation took place. The context was the operation of a system designed to ensure compliance with the Scottish Ministerial Code. Mr Hamilton's role was essentially that of an adviser to the Scottish Ministers. For the purpose of tendering that advice he had been expressly instructed to conduct an investigation in the course of which he would inevitably have to ingather evidence. He created and obtained the requested information in compliance with the instructions issued to him by the Ministers. This all points strongly towards the existence of an appropriate connection between the information and the Scottish Ministers.

[44] The circumstances of the present case are very different from the examples figured in Coppel, *ibid* (para 20-009) of circumstances where there would be no appropriate connection between the information and the public authority: mere deposit of information with an authority in the absence of any request for it or use of it by the authority; the lack of any right of control, amendment or deletion of the information by the authority; accidental leaving of the information with the authority; or information which simply passes through the hands of the authority. Here Mr Hamilton was fulfilling a remit set for him by the

Scottish Ministers with the aim of enabling them to decide whether there had been a breach of the Scottish Ministerial Code.

[45] It is also significant in considering whether an appropriate connection exists to recall that the information was held on the Scottish Government's IT systems. In this connection it is notable that in their written submissions the Ministers accept that they (or their officials) could gain access to the information. They acknowledge that some of the email accounts of secretariat members had permission settings which allowed team members access and they accept that those inboxes were accessed on one occasion (para 15).

[46] In their response to the Commissioner dated 13 September 2021 the Scottish Government stated that they had considered whether they held any information falling within the scope of the request "leaving out of account any information that happened to be on Scottish Government systems but [was] accessible only to the secretariat ..." They concluded that the Scottish Government held some (but not all) of the written evidence provided to Mr Hamilton.

[47] It is thus clear that the basis of the Ministers' view that they did not hold the information depends fundamentally on the fact that they imposed internal restrictions on who could gain access to the information. This stance is circular and unconvincing. The very fact that the Scottish Ministers had the requisite control over the information so as to enable them put in place internal arrangements regulating access to it infers that they held the information; otherwise how could they have been entitled to impose those restrictions.

[48] The Ministers' argument comes to this. They are entitled to rely on access restrictions which they unilaterally created and which they could unilaterally retract. Such an approach would in effect permit them to construct a technical barrier between them and the information with a view to putting the information beyond the reach of the freedom of

information regime. This would defeat the objective of open and transparent government.

In short, an agreement reached with the secretariat that investigation materials should be held by Mr Hamilton rather than by the Ministers cannot affect the answer as to whether, on a proper construction of section 3(2), the Ministers hold that information.

[49] It is notable also that there was nothing in Mr Hamilton's remit which sought to suggest that the Ministers were only entitled to receive his report and not the information on which it was based and which had been gathered by Mr Hamilton in the course of his investigation. Nor was there anything in the internal directions issued by the Scottish Government to the secretariat which purported to impose restrictions on Ministers' access to the information created by the investigation.

[50] The Commissioner was correct to attach importance to the fact that the investigation report was to be submitted to the Deputy First Minister and that the decisions on which parts of the report to redact were taken by the Scottish Government, on whose website the redacted report was published. At the conclusion of the investigation, a final report setting out Mr Hamilton's findings was made available to the Deputy First Minister. It is evident from the Note which Mr Hamilton asked to be published alongside the redacted report that the decision over what information should be redacted from the report prior to its publication lay not with him, or with his secretariat, but with the Ministers (for example, the Note clearly states, "I have had no responsibility for deciding what to redact"). Again, this suggests that the Ministers were exercising a right of control over the material.

[51] The Commissioner rightly observed that compliance with the Scottish Ministerial Code was a matter in which the Scottish Ministers collectively had an interest. Ministers were bound by the Code as regards the duties it imposed on them.

[52] In para 26 of his decision the Commissioner drew together the essence of his findings as follows:

“The referral with its associated investigation was instructed and carried out, evidence was obtained, and the report produced, for the purpose of considering whether the First Minister’s conduct complied with the Code and advising on appropriate sanctions if it did [not]. Information was obtained and created for that purpose. In the Commissioner’s view, this amounts to an appropriate connection with the Authority such that information is held by it for the purposes of section 3(2) of FOISA.”

The Court can identify no flaw in this reasoning.

[53] In the circumstances of the present case the Court is satisfied that there are numerous factors evidencing an appropriate connection between the requested information and the Scottish Ministers.

[54] In summary, the whole purpose of Mr Hamilton’s investigation was to consider whether the First Minister had breached the Scottish Ministerial Code. The Ministers were seeking advice on that question; they were not bound to accept the advice. The matter was one in which the Ministers had an intense and legitimate interest. The Code sets out the duties collectively incumbent on ministers. The information supplied for the purposes of the investigation is closely connected with the activities and functioning of the Scottish Government.

[55] It is important to stress that the effect of adopting a non-technical approach to the concept of holding information will not create undue problems for public authorities. In this connection the scheme of FOISA needs to be viewed as a whole. The point was well put by Judge Wikeley in *University of Newcastle upon Tyne* at para 41:

“... a key feature of the FOIA regime is the need to balance the interests of the requester and the public interest in the free flow of information with the legitimate interests of public authorities and third parties. Moreover, that balance is struck not by over-complicating the simple factual concept of whether information is “held”

by a public authority – rather, it is achieved by the matrix of absolute and qualified exemptions and the application, where appropriate, of the public interest test.”

[56] For these reasons the court refused the appeal.