

Decision Notice

Decision 115/2017: Ms X and the Scottish Ministers

Meetings with Russian state officials

Reference No: 201700774

Decision Date: 19 July 2017



Scottish Information
Commissioner

Summary

The Scottish Ministers (the Ministers) were asked for details of meetings between the Scottish Government and Russian state officials between specific dates. The Ministers responded, relying after a review on sections 25(1) (Information otherwise accessible) and 27(1) (Information intended for future publication) of FOISA.

Following an investigation, the Commissioner accepted that the Ministers did not hold the information requested, and had wrongly relied upon sections 25(1) and 27(1) of FOISA. She found that the Ministers failed to give proper notice that the information was not held, and failed to provide adequate advice and assistance.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible); 27(1) (Information intended for future publication)

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 13 March 2017, Ms X made a request for information to the Ministers. The information requested was:
 - a) *the number of meetings that have taken place between members of the Scottish Government and Russian state officials between 1 January 2016 and today's date, inclusive;*
 - b) *for each such meeting i) the date it took place, ii) the names and job positions of all members of the Scottish Government and all Russian state officials who were present, and iii) the purpose and outcome of the meeting.*
2. The Ministers responded on 27 March 2017. The Ministers stated that complying with the request in full would require a search of all Scottish Government records and cost more than £600 and so they were not obliged to comply (section 12(1) of FOISA).
3. On 28 March 2017, Ms X wrote to the Ministers requesting a review of their decision. She did not accept that the Ministers would have to search all government records as claimed. She commented that there are fewer than 30 members of the Scottish Government, including cabinet secretaries, other ministers and law officers.
4. Also on 28 March 2017, in addition to requesting a review of the above response, Ms X wrote separately to the Ministers with a narrowed request. In this, she asked for:

... the subset of the requested information that is held in relation to meetings with Russian state officials in the stated time period by any of the following: the First Minister; the Deputy First Minister; the Cabinet Secretary for Finance and the Constitution; the Cabinet Secretary for Culture, Tourism and External Affairs; the Minister or Business, Innovation and Energy;

the Minister for International Development and Europe; and the Minister for UK Negotiations on Scotland's Place in Europe.

5. She confirmed that the narrowed request was without prejudice to her requirement for review of the response to her initial request of 13 March 2017.
6. The Ministers responded to the narrowed request on 31 March 2017. The Ministers stated that they held no information as there were no recorded meetings between those listed in the request of 28 March 2017 and Russian state officials.
7. For future reference, the Ministers also advised that Ms X should be aware that all meetings involving Scottish Government Ministers are proactively published on the Government website. They provided a link to where these details could be located. They went on to explain that, in this instance, they were unable to provide the information requested from September 2016 to March 2017 because the exemption in section 27(1) of FOISA (Information intended for future publication) applied.
8. On 18 April 2017, the Ministers provided Ms X with a further response to her initial request of 13 March 2017. The Ministers stated that in addition to the response of 31 March 2017, there were no recorded meetings between Russian Officials and any other members of the Scottish Government over the period requested. The Ministers repeated that, in this instance, they were unable to provide the information requested from September 2016 to March 2017 because the exemption in section 27(1) of FOISA applied.
9. The Ministers then notified Ms X of the outcome of their review, on 28 April 2017. They stated that the original decision was being upheld, with modifications. The Ministers accepted that section 12(1) of FOISA did not apply to Ms X's request of 13 March 2017, having considered the definition of the Scottish Government set out in her requirement for review.
10. The Ministers informed Ms X that information from January 2016 to November 2017 was available on the Scottish Government website and so, under section 25(1) of FOISA, they did not have to provide the information as it was reasonably accessible already. In relation to information from December 2016 to 13 March 2017, the Ministers stated that they were unable to provide the information because the exemption in section 27(1) of FOISA applied.
11. Finally, the Ministers informed Ms X that section 12(1) of FOISA applied to the names and job positions of all Russian state officials who were present at each meeting as well as the outcome.
12. On 30 April 2017, Ms X wrote to the Commissioner. She applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Ms X did not accept that there were no recorded meetings falling within the scope of her request and asked the Commissioner to confirm the actual number. As an example, Ms X referred to the Russian Consulate-General in Edinburgh reporting on its website that the Burns Night supper held by the Presiding Officer of the Scottish Parliament on 25 January 2017, attended by Russian Consul-General Andrei Pritsepov, had the First Minister as its honorary guest.

Investigation

13. The application was accepted as valid, in relation to Ms X's original request. The Commissioner confirmed that Ms X 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.

14. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. On 15 June 2017, the Ministers were notified in writing that an application had been received from Ms X and were invited to comment on this application. The Ministers were asked to provide submissions on their handling of Ms X's request, with emphasis on the application of sections 15(1), 17(1), 25(1) and 27(1) of FOISA.
15. In response, the Ministers acknowledged that there had been a number of errors in responding to Ms X's request of 13 March 2017, her subsequent narrowed request and requirement for review.
16. The Ministers submitted that they did not hold information falling within the scope of the request and accepted that they should have issued Ms X a notice in terms of section 17(1) of FOISA, confirming that no information was held.
17. The Ministers submitted that it was unclear as to why the review outcome of 28 April 2017 claimed section 25(1) of FOISA applied, as it should have been clear they did not hold information falling within the scope of the request. The Ministers apologised for the confusion this had caused.
18. Referring to the application of section 27(1) of FOISA, the Ministers explained while they held no information falling within the scope of Ms X's request, they had become aware of the meeting on 15 March 2017 by the time they received her requirement for review and the narrowed request. They acknowledged, however, that this fell outwith the scope of either request.
19. The Ministers explained that details of meetings were published on their website at six-monthly intervals, and so were aware that 15 March 2017 meeting would be included in the next publication. The reference to section 27(1) of FOISA was made with this in mind: they acknowledged that the exemption did not in fact apply, and that it might have been more helpful simply to inform Ms X of the meeting.
20. During the investigation, the Ministers wrote to Ms X, conforming that they did not hold any information falling within the scope of her request. The Ministers also apologised for failing to provide her with sufficient advice and assistance in their earlier responses, advising her of the meeting of 15 March 2017 on the basis that it did not fall within the scope of her request.
21. Ms X acknowledged the further response by the Ministers, while submitting (with further reasons) that she believed the Ministers should hold information falling within the scope of her request.

Commissioner's analysis and findings

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

Information held by the Ministers

23. 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, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
24. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority *should* hold, although the applicant's reasons may be relevant to the investigation of what is actually held. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
25. The Commissioner has taken account of the submissions provided by Ms X, in which she provides reasons why he considers the Ministers should hold information falling within the scope of this request.
26. The Ministers provided submissions in response to the questions put by the investigating officer on this matter.
27. The Ministers confirmed that in responding to Ms X's request of 13 March 2017, they should have made it clear, in terms of section 17(1) of FOISA, that they did not hold information falling within the scope of the request. They also provided submissions on their application of section 25(1) and 27(1) of FOISA in correspondence with Ms X. These will be considered under section 15(1) (Duty to provide advice and assistance) below.
28. The Ministers confirmed the searches and enquiries they undertook to ascertain whether they held any information falling within the scope of Ms X's request, detailing the places searched and the search terms used. The conclusion of these searches and enquiries was that the Ministers held no information falling within the scope of the request.
29. In relation to Ms X's reference to the Presiding Officer's Burns Supper on 25 January 2017, the Ministers commented that the Presiding Officer of the Scottish Parliament is not a member of the Scottish Government and that any information on that event would be held by the Scottish Parliament and not by the Ministers. During the investigation, Ms X was advised of this and provided with the Scottish Parliament contact details, should she wish to make a request for any relevant information. In response to further questions during the investigation, the Ministers also confirmed that they held no information on this event which would fall within the scope of the request: the First Minister had attended, but their records disclosed nothing in relation to the potential or actual attendance of the Consul-General.
30. Having considered all relevant submissions and the terms of the request, the Commissioner accepts that (during the investigation) the Ministers interpreted Ms X's request reasonably and took adequate, proportionate steps in the circumstances to establish what information they held. She also accepts that it was reasonable in all the circumstances for the Ministers to conclude that they did not hold any information falling within the scope of Ms X's request.
31. Given the nature of the event on 25 January 2017, it is quite intelligible that the Ministers would hold no information on the attendance of the Consul-General (presumably, after all, the First Minister and the Consul-General were not the only guests). That being the case, the event would not fall within the scope of the request and there would be no expectation that it would be picked up by reasonable searches conducted by the Ministers.

32. Given that no such information was held by the authority, the Ministers had a duty to issue a notice in writing to that effect, in order to comply with the terms of section 17(1) of FOISA. The Commissioner notes that their response to the narrowed request (which is not the subject of this decision) started by confirming that they did not hold any information falling within the scope of the request, although they went on to explain that they were relying upon section 27(1) of FOISA for the period from September 2016 to March 2017. The review outcome made no reference to information not being held, but relied upon section 25(1) and 27(1) of FOISA (and indeed section 12(1), albeit in relation to elements of the request which are not covered by Ms X's application).
33. Taking account of all of the correspondence the Commissioner cannot consider that the Ministers provided Ms X with proper notice that they did not hold any information falling within the scope of her request. As the Ministers failed to give such notice, the Commissioner finds that they failed to comply with the requirements of section 17(1) of FOISA.
34. The Commissioner notes that, during the investigation, the Ministers wrote to Ms X and apologised for any previous error, confirming that no information was held. In the circumstances, she does not require the Ministers to take any action.
35. As the Commissioner accepts that the Ministers did not hold information falling within the scope of Ms X's request, and they have confirmed that there was therefore no basis for withholding information under these (or any other) exemptions, she must also find that the Ministers incorrectly relied upon sections 25(1) and 27(1) of FOISA in responding to Ms X.

Section 15(1) - Duty to provide advice and assistance

36. Section 15(1) of FOISA requires a Scottish public authority, so far as it is reasonable to expect it to do so, to provide advice and assistance to a person who has made, or proposes to make, a request for information to it.
37. The Ministers stated that at the time they received Ms X's request for review, on 28 March 2017, officials were aware that a meeting had taken place on 15 March 2017, which was two days after Ms X submitted her original request. They acknowledged that any information held regarding the meeting of 15 March 2017 was not within the scope of Ms X's request. However, they also believed section 27(1) would apply to information on the 15 March meeting, should she make a subsequent request: in that context, citing the exemptions was seen as helpful.
38. On reflection, the Ministers acknowledged that their attempt to be helpful had confused matters. It should have been explained that any reference to section 27(1), in this context, was advisory, with reference to future requests. In this case, they accepted that it would have been more helpful just to tell Ms X about the meeting. It would also be helpful, in future, to give the requester advice and assistance to allow them to identify the information they were seeking, particularly with reference to any adjustment of the timeframe which would allow the request to capture known events: they apologised for not doing so in this case.
39. In this case, broadly, the Commissioner accepts the Ministers' analysis as summarised in the preceding paragraphs. Taking account of all of the circumstances, the Commissioner is not satisfied that the Ministers provided Ms X with adequate advice and assistance to fulfil their duty under section 15(1) of FOISA. She agrees with the Ministers that it would have been

reasonable to either provide the information (on the 15 March meeting) at the time or advise Ms X (with appropriate explanation in relation to the timeframe) to submit a new request.

40. Given the explanation provided here (and to Ms X, during the investigation), the Commissioner does not require the Ministers to take any action with regard to this failure.

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) by failing to notify Ms X, in line with section 17(1) of FOISA, that they did not hold information falling within the scope of her request.

She also finds that the Ministers were wrong to rely on sections 25(1) and 27(1) of FOISA (and thereby failed to comply with section 1(1) of FOISA), and failed to provide reasonable advice and assistance as required by section 15(1) of FOISA.

In the circumstances narrated in this Decision Notice, the Commissioner does not require the Ministers to take any action in respect of these failures, in response to Ms X's application.

Appeal

Should either Ms X 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

19 July 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.

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...

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.

...

25 Information otherwise accessible

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

...

27 Information intended for future publication

(1) Information is exempt information if-

- (a) it is held with a view to its being published by-
 - (i) a Scottish public authority; or
 - (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

- (b) when that request is made the information is already being held with that view; and
- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info