

Decision Notice

Decision 203/2014: Mr Simon Johnson and the Scottish Ministers

Ryder Cup delegation expenses

Reference No: 201400253

Decision Date: 22 September 2014



Summary

On 16 October 2013, Mr Johnson (of the Daily Telegraph) asked the Scottish Ministers (the Ministers) for a detailed breakdown of expenses incurred by Team Scotland during the 2012 Ryder Cup visit to the USA. The Ministers did not respond to this request. Following an application to the Commissioner and a review, they disclosed some information. Mr Johnson remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the Ministers disclosed further information, the Commissioner required the Ministers to disclose the remaining withheld information (the name of a hotel) to Mr Johnson. She concluded that disclosure of this information was not likely to endanger the health or safety of a Minister, as the Ministers had argued.

The Commissioner also found that, by initially withholding information they later concluded was not exempt from disclosure, the Ministers failed to respond to the request as required by section 1(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 39(1) (Health, safety and the environment); 50(1)(a) (Information notices)

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 and Investigation

1. The following table provides a summary of the main points of Mr Johnson's request for information and requirement for review, their handling by the Ministers, his application to the Commissioner for a decision and the investigation carried out by the Commissioner's office.

Date	Details
	Request and review
16 October 2013 (at 12.24)	Initial request Mr Johnson emailed the Ministers, requesting the following information: "... a schedule breaking down the total £468,580 cost of Team Scotland's visit to the US in September and October last year related to the Ryder Cup. Please provide details of each purchase that makes up this sum, specifically: 1) The date of each purchase 2) The amount of each purchase 3) The payee for each transaction 4) A description of the item / service purchased in each transaction. Please be as specific as possible about the item purchased, e.g. if possible state 'champagne' rather than 'drinks' for guests at a reception."

Date	Details
16 October 2013 (at 17.39)	<p>Initial response The Ministers emailed Mr Johnson, stating that they did not hold any information falling within the scope of his request.</p>
30 October 2013	<p>Amended response The Ministers wrote to Mr Johnson again, stating that they had identified some information falling within the scope of his request, which they were considering. They apologised for their earlier oversight.</p>
9 December 2013	<p>Requirement for review As he had received nothing further from the Ministers apart from an acknowledgement, Mr Johnson asked the Ministers to review their failure to provide him with a substantive response to his request within 20 working days.</p>
20 January 2014	<p>First application to the Commissioner Mr Johnson applied to the Commissioner in respect of the Ministers' failure to respond to his request and requirement for review.</p>
24 January 2014	<p>Response to review requirement The Ministers conducted a review and responded to Mr Johnson. They disclosed information on the visit, noting the bulk of the costs of the associated programme of events had already been disclosed by VisitScotland. The remaining costs of the delegation amounted to £51,111.93. The Ministers provided Mr Johnson with a broad breakdown of this figure.</p> <p>Subsequently, the Commissioner's <i>Decision 015/2014</i> recorded the Ministers' failure to respond to Mr Johnson in accordance with Part 1 of FOISA.</p>
6 February 2014	<p>Further application to the Commissioner Mr Johnson applied to the Commissioner, in terms of section 47(1) of FOISA. He did not believe the Ministers had provided a breakdown to the level of detail he required. The application was validated and the case allocated to an investigating officer.</p>
	<p>Commissioner's investigation</p>
14 February 2014	<p>Submissions sought The investigating officer wrote to the Ministers, as required by section 49(3)(a) of FOISA, giving them notice of the application and seeking their comments within three weeks.</p>
14 March 2014	<p>Submissions from the Ministers The Ministers responded to the investigating officer with a further explanation of the level of detail at which they held information covered by Mr Johnson's request. Some information, specifically the names of hotels used by the delegates, was withheld under section 39(1) of FOISA.</p>
20 March 2014	<p>Submissions from Mr Johnson Mr Johnson challenged the Ministers' application of section 39(1) to the hotel names. In addition, he expressed surprise that the Ministers did not hold more detailed information than that supplied to him already.</p>

Date	Details
20 March 2014	<p>Further information required from Ministers</p> <p>Following consideration of the submissions received from both parties, the investigating officer asked the Ministers for further comments, particularly on the recording and retention of information relating to the expenses in question.</p>
4 April 2014	<p>Ministers state no further information held</p> <p>The Ministers denied holding any more detailed record of the information.</p>
7 April 2014	<p>Ministers asked to clarify points</p> <p>The investigating officer asked the Ministers for clarification of their previous response.</p>
15 April 2014	<p>Further clarification sought</p> <p>The Ministers were asked for additional comments on a number of specific points.</p>
8 May 2014	<p>Ministers respond</p> <p>The Ministers responded to the letter of 15 April. They provided submissions on the application of section 39(1), acknowledging that (subject to police advice) international hotel names could be disclosed. They also provided further submissions, with supporting information, on the level of detail held.</p>
28 May 2014	<p>Information Notice issued</p> <p>The Commissioner was not satisfied with the information received from the Ministers to date and issued the Ministers with an Information Notice under section 50(1)(a) of FOISA. They were asked for a further breakdown of the expenses, with supporting documentation.</p>
30 June 2014	<p>Meeting with the Ministers and Police Scotland</p> <p>A meeting took place between the Commissioner and representatives of the Ministers and Police Scotland, to discuss the security issues underpinning the Ministers' application of section 39(1) to the hotel names.</p>
14 July 2014	<p>Section 39(1) submissions from the Ministers</p> <p>The Ministers provided further comments on their application of section 39(1).</p>
14 July 2014	<p>Information Notice response</p> <p>The Ministers responded to the Information Notice. They confirmed their willingness to disclose the names of international hotels used during the visit, but sought to withhold the name of one hotel in the United Kingdom (considered further below) under section 39(1). They provided copies of relevant invoices, receipts and card statements, with submissions on the steps taken to identify and locate this information</p>
29 July 2014	<p>Commissioner asks Ministers for further clarification</p> <p>The Ministers were asked to clarify a number of points in their response to the Information Notice, and to confirm what further information had now been disclosed to Mr Johnson.</p>

Date	Details
15 August 2014	<p>Response to further questions</p> <p>The Ministers stated that they were content to compile and provide a further breakdown to Mr Johnson (but had not done so at that point). They also responded to the other questions in the letter of 29 July.</p>
21 August 2014	<p>Confirmation that further disclosure to be made</p> <p>Following a telephone call from the Commissioner's office, the Ministers stated that the additional information would be supplied to Mr Johnson on 25 August 2014. They also confirmed that, in their view, they had now identified and located (and supplied to the Commissioner) all information falling within the scope of Mr Johnson's request.</p>
25 August 2014	<p>Further information disclosed to Mr Johnson</p> <p>The Ministers wrote to Mr Johnson with a further breakdown of the expenses.</p>

Commissioner's analysis and findings

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

Section 1(1) of FOISA

- The Commissioner notes the Ministers' assertions, in the early stages of the investigation, that they could not provide Mr Johnson with a more detailed breakdown of the expenses than that given to him on 24 January 2014. In fact, a breakdown meeting the terms of his request was not supplied to him until 25 August 2014.
- The Commissioner has considered the Ministers' submissions on this point. In particular, she has noted their explanation, following the Commissioner's Information Notice of 28 May 2014, that they undertook a comprehensive review and search for relevant information, involving all relevant files and stored information. Having considered these submissions and the information located, she is satisfied that the investigation has concluded with the Ministers identifying and locating all the information they held and which fell within the scope of Mr Johnson's request. With the exception of one hotel name (considered further below), this is the information disclosed to Mr Johnson on 25 August 2014.
- The Ministers did not provide this information to Mr Johnson until well after he applied to the Commissioner. In the circumstances, the Commissioner must find that the Ministers breached the requirements of section 1(1) of FOISA in responding to Mr Johnson's request, by failing to identify, locate and provide all the information they held and which fell within the scope of the request.

Section 39(1) of FOISA – Health, safety and the environment

- The Ministers applied this exemption to the name of one UK hotel used by one of the delegates (not the First Minister) in the course of travel to the USA.

7. Section 39(1) of FOISA states that information is exempt information if its disclosure under FOISA would, or would be likely to, endanger the physical or mental health or the safety of an individual. This is a qualified exemption and is subject to the public interest test in section 2(1)(b) of FOISA.
8. The Commissioner's briefing¹ on this exemption notes that section 39(1) does not contain the "substantial prejudice" test found in various other exemptions contained in Part 2 of FOISA. Instead, this exemption refers to the "endangerment" of health or safety.
9. The Commissioner's view is that the term "endanger" is sufficiently broad to apply where there is a direct or indirect threat to the safety of a person which would foreseeably arise in the future, as well as immediate harm, since the exemption does not specify that any threat should be imminent before it applies. The Commissioner considers that for endangerment to be considered likely there must be some well-founded apprehension of danger, such that the prospect of harm could be regarded as a distinct possibility.
10. In order for the exemption to apply, the public authority must be able to explain or show why disclosure of the information would be (at least) likely to cause such endangerment. There must be an evident connection between the two events (disclosure and endangerment).

The Ministers' submissions

11. The Ministers referred to the submissions in the case of *Decision 182/2014 Mr Andrew Picken and the Scottish Ministers*. These submissions were made in relation to the names of hotels used by Ministers on official business.
12. The Ministers submitted that they often used the same hotels when travelling; consequently, disclosure of the names of the hotels they stayed in could impact on the safety of the Scottish Cabinet or other Ministers and on the Scottish Government's ability to organise and ensure their safety, the safety of employees at certain venues, and the safety of the communities in which those venues were located. The Ministers considered disclosure of the withheld information could allow patterns of movement to be identified in some cases, where particular hotels were visited regularly: in cases where it might be publicly known that a Minister would be visiting a particular town or city on a particular date, the Ministers believed it would be possible to anticipate the hotel in which the Minister would be likely to stay.
13. The Ministers noted that some locations had few options for accommodation, and argued that it would be possible for individuals to link information already released about expenditure on Ministerial engagements and create their own data on previously-used Ministerial accommodation.
14. The Ministers acknowledged that information about the hotels in which they had stayed was sometimes released into the public domain after the Ministerial visit had taken place. They also acknowledged that, in the era of social media, "citizen journalists" might record and publish information on the location of well-known celebrities, public figures and politicians. They also acknowledged that information had been disclosed to requesters in similar cases, but contended that the political environment had changed significantly.

¹ <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section39/Section39.aspx>

15. The Ministers noted that security arrangements had been reviewed in the run-up to the Independence Referendum, with the result that they had reconsidered their position on the disclosure of data identifying patterns of accommodation and were now endeavouring to act consistently across all data sets to mitigate risk. They believed they needed to be consistent in their approach to security for Ministers and, therefore, regardless of the numbers of hotels in a location, they should not release hotel names in order to minimise the risk to Ministers and their staff, and consequences for public safety.
16. The Ministers stated that details of Ministerial engagements, and dates of and expenditure on overseas Ministerial travel, were published. In both cases, the Ministers recognised a public interest in making such information available, and accepted that, in practice, it would create significant difficulties for conducting Government business effectively if details of the cities visited by Ministers were not to be revealed (e.g. where a Minister is appearing at a public conference, the location usually needs to be publicly available). However, in terms of policy, the Ministers did not believe there was a need to release details of hotels stayed in: while they were in the hotel, the Minister would not be conducting public business members of the public might wish to attend.
17. In support of their position, the Ministers referred to Police Scotland advice received in the context of the review of Ministerial Security referred to above. The Ministers noted that the current political environment in Scotland had seen an increased interest in Ministers' activities. They argued that releasing information about a Minister's likely whereabouts, in advance, carried heightened risk for Ministers which needed to be managed.
18. The Ministers considered withholding the information reduced the likelihood of risk and contributed greatly to continued security, arguing that this was consistent with the advice received from Police Scotland. However, the Ministers did not provide any relevant examples of how the harm to individuals (other than the First Minister) might manifest itself, or refer to any relevant threats received. They acknowledged that there was no known serious specific threat, but stated that this did not mean the risk should not be taken seriously.
19. During the investigation, the Ministers confirmed that they did not publish a schedule of Ministerial engagements in advance, due to the security risk this would pose and the fact that diaries are fluid and often subject to change and cancellation at short notice. They acknowledged that information about Ministers' public engagements in any given week is widely available in advance, though, for example:
 - The Ministerial Code (sections 9.20 to 9.22)² sets out which elected representatives should be informed in advance of Ministerial visits. The Scottish Government also informs the Chief Executive of the relevant local authority of any planned visits in their area, usually 48 hours or more in advance.
 - Stakeholders will publicise events involving Ministers through their networks and/or local or national press.
 - Those attending events where Ministers are to be present will have this information ahead of the visit, and will frequently publicise the event or the anticipated Ministerial involvement through social media or on websites.

² <http://www.scotland.gov.uk/Resource/Doc/364058/0123666.pdf>

- Stakeholders or Scottish Government may also publicise events through regular formal press releases on the Scottish Government website.

Commissioner's conclusions on section 39(1)

20. The Commissioner has considered the Ministers' submissions carefully. She accepts that where security considerations and potential security risks are concerned, it is appropriate to take a cautious approach. It is in this context she gave careful consideration to the Ministers' arguments that disclosure of the information in question (i.e. the name of a domestic hotel) could put individuals at greater risk of harm in future, or make it more difficult or more expensive to protect them from any threat to their security.
21. The Ministers' arguments were based on their belief that disclosing the names of the hotel would endanger Ministers, as someone could use information about where Ministers had stayed (with other published information, such as advance information of Ministerial visits or information on social media sites) to work out a pattern of where they stay, and so be able to predict where they are likely to stay on a given occasion. Information about where Ministers were likely to stay, could, it was asserted, endanger them because disclosure could increase the risk of an attack on the Ministers. Increased attacks on Ministers could, in turn they claimed, endanger community and staff safety.
22. For the exemption in section 39(1) to apply, the Ministers need to show why disclosure of the information would, or would be likely to, endanger any person's safety. They must show why they consider there would be an increased risk sufficiently great to cause such endangerment. As the Commissioner's briefing states, although the threat need not be imminent, there must be some well-founded apprehension of danger: the prospect of harm must be a distinct possibility for endangerment to be considered likely.
23. Although Ministers made a strong argument about the possibility of locations being predicted, they have not provided any evidence to show why this should be likely to increase the risk of endangerment by potentially leading to attacks on Ministers other than the First Minister. For example, they did not provide any examples of specific, similar incidents, or provide any police or security reports or opinions beyond general advice that withholding information would reduce risk. With regard to the information under consideration here, as in *Decision 182/20143*, it is not clear to the Commissioner how withholding the information would reduce risk: the Ministers' arguments are predicated on their belief that disclosure would increase risk, suggesting that withholding it would mean the risk would remain the same.
24. The Commissioner is not satisfied in this case that the Ministers' arguments about increased risk of endangerment (in the event of disclosure of a single hotel name) are based on more than hypothetical supposition, and so is not persuaded that disclosure of the information would result in the harm claimed by the Ministers. She finds that the exemption in section 39(1) of FOISA does not apply to the withheld information.
25. Having concluded that the exemption was wrongly applied, the Commissioner is not required to consider the public interest test in relation to this information. She requires the Ministers to disclose the name of the hotel in question to Mr Johnson.

Ministers handling of the request

26. Mr Johnson made his request to the Ministers on 16 October 2013. He did not receive an adequate response from them until 25 August 2014, more than 10 months later. This is unacceptable.

27. The Ministers explained that “at the time of the original FOI request, the relevant staff were unable to locate the relevant information held by the Ministers.” Although this appeared to be the case, it does not excuse the Ministers’ failure to comply with the most basic right to information enshrined in FOISA. That is, an applicant’s right to receive, within 20 working days, the information held by a Scottish public authority which falls within the scope of their request where there is no basis under the legislation for it to be withheld.
28. All Scottish public authorities should have in place robust arrangements which enable them to identify and locate information they hold, when that information is requested by any person. A failure to do so, until numerous interventions were made by the applicant and the Commissioner over a considerable period, must call into question whether the Ministers can be said to have such arrangements in place, at least in relation to the information covered by this request.
29. The Ministers’ handling of this request cannot be considered to reflect what the Commissioner would regard as good (or even remotely acceptable) practice in responding to an information request under Part 1 of FOISA. This is all the more unacceptable in this case given there is a reasonable expectation that information of this type (expenses incurred in the course of official duties) is likely to be requested and scrutinised (if not proactively published).

Decision

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Johnson, by wrongly withholding information under section 39(1) of FOISA and by withholding information that they later concluded was not exempt from disclosure.

The Commissioner requires the Ministers to disclose the information remaining withheld under section 39(1) (the name of the domestic hotel), by 7 November 2014.

Appeal

Should either Mr Johnson 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

Enforcement

If the Scottish Ministers fail to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Scottish Ministers failed to comply. The Court has the right to inquire into the matter and may deal with the Scottish Ministers as if they had committed a contempt of court.

Rosemary Agnew
Scottish Information Commissioner
22 September 2014

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.

...

- (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.

...

39 Health, safety and the environment

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, endanger the physical or mental health or the safety of an individual.

...

50 Information notices

- (1) Where the Commissioner –

- (a) has received an application under section 47(1); ...

that officer may give the authority notice in writing (referred to in this Act as “an information notice”) requiring it, within such time as is specified in the notice, to give the officer, in such form as may be so specified, such information relating to the application, to compliance with this Act ... as is so specified.

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