

Decision Notice 034/2022

Recorded process for making a formal complaint about a Scottish Government consultation document

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202100831



Scottish Information
Commissioner

Summary

The Ministers were asked for information on the recorded process whereby a member of the public could make a formal complaint about a Scottish Government consultation document providing false information, such that the consultation could be withdrawn, reworded and reissued with the correct information.

The Ministers provided some information, but the Applicant believed further information may be held. The Commissioner investigated and found that, with the exception of information on how to make a complaint about the service provided by the Ministers, the Ministers had complied with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 16(1)(c) (Refusal of request); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible)

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 4 May 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers) in connection with the March 2021 consultation document entitled "Regulation of Child Contact Services: Consultation". The information requested under FOISA was:

As a Freedom of Information (Scotland) Act 2002 request what is the recorded process whereby a member of the public can make a formal complaint about a Scottish Government Consultation document that provides false information such that the Consultation can be withdrawn, reworded and reissued with the correct information?

The request included background information setting the context in which the Applicant considered the information to be false.

2. The Ministers responded on 1 June 2021. They informed the Applicant there was a "Comments and Complaints" section in the consultation on the Regulation of Child Contact Services. They referred the Applicant to section 1.37 which stated "If you have any comments about how this consultation exercise has been conducted, please send them by email to: family.law@gov.scot". The Ministers suggested the Applicant might wish to respond to the consultation, which was open until 12 July 2021, detailing his concerns. The Ministers also stated there was information on the Scottish Government website on making a complaint if dissatisfied with their service: they provided the corresponding weblink¹.
3. On 7 June 2021, the Applicant wrote to the Ministers, requesting a review of their decision as he believed the Ministers should have provided a response in terms of section 25 of FOISA, given the answer to his request was already in the public domain. He argued that their

¹ [Make a complaint - gov.scot \(www.gov.scot\)](https://www.gov.scot)

failure to do so indicated that his request had not been responded to with the information requested.

4. The Applicant commented on the content of the consultation document being, in his view, both false and misleading. He asked the Ministers to respond formally in terms of section 25 of FOISA, to confirm that the complaint process described in their response could lead to a consultation being withdrawn and reissued where based on false information. He argued that, if a consultation issued by the Scottish Government contained materially false information, and such consultations were “fait accompli” documents and there could be no reissuing of them following an upheld complaint, then the Ministers should respond formally in terms of section 17(1) of FOISA that the information requested was not held.
5. The Ministers notified the Applicant of the outcome of their review on 1 July 2021, fully upholding their original decision. The Ministers stated that their initial response detailed the procedure for making a formal complaint plus other options for a member of the public to raise comments or concerns about a Scottish Government consultation document they perceived provided false information. They explained that whether this might lead to the consultation being withdrawn, reworded and reissued, or otherwise, would then be a matter for the Ministers and the individual policy team to consider, based on the specific circumstances of the case.
6. With reference to the Applicant’s suggestion that the Ministers respond in terms of section 25 or section 17 of FOISA, the Ministers were satisfied that their initial response provided all of the information held within the scope of the request, which set out the process whereby a member of the public could make a formal complaint about a Scottish Government consultation document that provides false information. In the Ministers’ view, a response in terms of section 25 or section 17 would not be appropriate as their initial response provided the information requested.
7. On 11 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Ministers’ review because he believed they should have responded either in terms of section 17(1) or section 25(1) of FOISA. The Applicant believed the Ministers had no process in place for the withdrawal and reissue of consultation documents containing information that was false. He asked the Commissioner to require the Ministers to provide a formal response in terms of either section 17(1) or section 25(1) of FOISA, on the basis that their response contained no further information to that which was publicly available and that Scottish Government consultations were therefore clearly “fait accompli” documents.

Investigation

8. The application was accepted as valid. The Commissioner confirmed that the Applicant had made a request for information to a Scottish public authority and had asked the authority to review its response to that request before applying to him for a decision.
9. On 11 August 2021, the Ministers were notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
10. 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. These focused on whether or not the Ministers should have responded in terms of either section 17(1) or section 25(1) of FOISA.

11. Both parties provided submissions to the Commissioner.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. He is satisfied that no matter of relevance has been overlooked.

The information held and the handling of the request by the Ministers

13. 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.
14. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at the time the request is received. This is not necessarily to be equated with information an applicant believes the authority should hold. 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.
15. Section 1(6) of FOISA makes this obligation subject to various provisions which allow Scottish public authorities to withhold information, or charge a fee for it.
16. Section 25(1) of FOISA provides that information which is reasonably obtainable by the applicant, other than by requesting it under section 1(1), is exempt information.

The Applicant's submissions

17. In his application to the Commissioner, the Applicant was dissatisfied that the Ministers had not issued a formal response in terms of either section 17(1) or section 25(1) of FOISA.
18. The Applicant argued that the information provided was clearly available to him from reading the consultation document, but none of this information stated that a consultation document could be withdrawn and reissued with the correct information so that future legislation could be based on accurate and correct information being provided to the public. In his view, the Ministers had provided no more information than that which was publicly available and therefore a response in terms of section 25(1) should have been given (if the consultation document could be withdrawn and reissued).
19. However, in the Applicant's view, the Ministers had never faced a situation where a Scottish Government consultation document had been proved to contain materially false information, and they did not have established protocols in place to withdraw and reissue consultation documents that contained false information.
20. The Applicant further submitted that a response in terms of section 17(1) of FOISA would logically lead to the conclusion that the consultation reissue process did not exist. In his view, if the Ministers did not have a formal process in place for reissuing consultation documents (i.e. more than just a complaint process which, he argued, could land on "deaf ears"), then they should respond formally in terms of section 17(1).

The Ministers' submissions

21. In their submissions to the Commissioner, the Ministers referred to the information provided to the Applicant in their initial response, as contained in paragraph 1.37 of the consultation on the Regulation of Child Contact Centres (referred to above), and provided the

Commissioner with the corresponding weblink² to the consultation. The Ministers submitted that it was open to the Applicant to complain about the consultation: the Scottish Government would then consider the complaint and, if it was considered to have merit, take action as required.

22. The Ministers informed the Commissioner that they did not consider it necessary to conduct searches for the information requested as the officials responsible for the consultation were aware that the consultation document itself provided information on how to complain about a consultation. However, for the sake of completeness during the course of the Commissioner's investigation, the Ministers stated a search of their electronic records management system had been undertaken, using the keywords "consultation withdrawn" and "consultation inaccurate". These searches did not identify any specific recorded information on the possibility of withdrawing, rewording and reissuing a Scottish Government consultation because it contained false information, or on this actually having taken place (although they did identify a consultation that had been withdrawn for different reasons).
23. The Ministers considered the request to be for "information about the recorded process whereby a member of the public can make a formal complaint about a Scottish Government consultation document that provides false information such that the consultation can be withdrawn, reworded and reissued with the correct information". They submitted they had provided the Applicant with a link to information on how to complain about the consultation.
24. In the Ministers' view, when considering whether the request extended to include a particular set of circumstances and possible outcomes, it was not for the FOI process to anticipate the result of any such complaint. They stated that the scenario where false or inaccurate information in a consultation could mean that it had to be withdrawn and/or reissued was possible, albeit unlikely. This, the Ministers submitted, would depend on the individual circumstances of the consultation and the terms of the complaint. The Ministers confirmed they held no recorded evidence of this action having taken place as they had not withdrawn a consultation on such grounds.
25. The Ministers believed they had provided the Applicant with the information requested on how to make a complaint but acknowledged that, in responding to the Applicant's request, they should have applied the exemption in section 25(1) of FOISA when providing the link to certain information, rather than the information itself.
26. In the Ministers' view, the Applicant was asking about a hypothetical situation to ascertain the potential outcomes of a complaint of this nature. On review, the Ministers did not consider it appropriate to issue a formal notice in terms of section 17(1) of FOISA. Acknowledging they should have relied on section 25(1) for some of the information requested, the Ministers maintained they had provided all of the information held falling within the scope of the request.

The Commissioner's views

27. The Commissioner has considered the matters of contention raised by the Applicant, and the submissions from the Ministers.

Section 17(1) – Notice that information is not held

28. In terms of section 1(4) of FOISA, the information to be provided in response to a request under section 1(1) is that falling within the scope of the request and held by the authority at

² [Child contact services - regulation: consultation - gov.scot \(www.gov.scot\)](https://www.gov.scot/topics/child-contact-services-regulation-consultation)

the time the request is received, subject to certain qualifications which are not applicable in this case. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give an applicant notice in writing to that effect.

29. The Commissioner notes that the Ministers provided the Applicant with details of two routes for making a complaint: the first setting out that comments on how that particular consultation exercise has been conducted could be sent to a specific email address, and the second being a weblink providing access to information on how to make a complaint about the service provided by the Scottish Government.
30. The Commissioner can understand that the information accessible via the weblink provided to the Applicant might not have satisfied the Applicant that all of the relevant information held had been provided to him. As set out above, the Ministers acknowledged that the exemption in section 25(1) of FOISA should have been applied to this particular information. This matter is considered further below.
31. Turning to the wording of the Applicant's request, the Commissioner notes that it seeks information on how to make a complaint about a consultation document where a particular set of circumstances are believed to exist. As set out above, the information to be provided in response to a request under FOISA is that which is recorded by the authority and held at the time the request is received. The FOI process does not allow for information to be newly created in order to satisfy a response to a request.
32. Having considered the responses provided by the Ministers, the Commissioner notes that the approach taken by the Ministers in responding to the Applicant's request appears to address the first part of the Applicant's request, i.e. that which seeks recorded information on how to make a complaint about a consultation document (for which the Ministers provided information). In the Commissioner's view, he considers this to have been a reasonable approach in the circumstances. Regardless of any hypothetical scenario (as described in the Applicant's request), the process for making a complaint would be the same.
33. Having considered all the relevant submissions and the terms of the request, the Commissioner is satisfied that the Ministers took adequate and proportionate steps to establish what recorded information they held falling within the scope of the Applicant's request.
34. Taking account of all of the information before him, and the circumstances outlined above, the Commissioner is satisfied, on the balance of probabilities, that it would not have been appropriate for the Ministers to respond to the Applicant's request in terms of section 17(1) of FOISA, given that they held, and provided, information in response to the Applicant's request.

Section 25(1) of FOISA – Information otherwise accessible

35. Under section 25(1) of FOISA, information which an applicant can reasonably obtain, other than by requesting it under section 1(1) of FOISA, is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
36. The Commissioner would note that when considering, under FOISA, the disclosure of information which is already otherwise available, there is no mandatory requirement for a Scottish public authority to respond in terms of section 25(1) if it chooses to provide the information itself (which was what the Ministers did, for the information in the consultation

document on where to send comments on how the consultation exercise had been conducted).

37. For the information on how to make a complaint to the Ministers if dissatisfied with their service, the Commissioner notes that, in their response to the Applicant, the Ministers only provided the weblink giving access to that information, and not the information itself. In this respect, however, the Commissioner is satisfied that this information was reasonably obtainable by the Applicant (i.e. via the weblink), other than by him requesting it under section 1(1) of FOISA. The Commissioner also notes the Ministers' submissions to the effect that they should have applied section 25(1) of FOISA to this information.
38. In all the circumstances, the Commissioner finds that the Ministers were entitled to apply section 25(1) of FOISA to this information.
39. However, under section 16(1)(c) of FOISA, Scottish public authorities must specify the exemption or exemptions which they are relying on to withhold information. The Ministers have accepted they did not provide the Applicant with the information itself and should have made it clear to the Applicant that they were relying on section 25(1) of FOISA to withhold the information. Failure to do so was a breach of section 16(1)(c).

Decision

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

With the exception of certain information on how to make a complaint about the service provided by the Ministers, the Commissioner is satisfied that the Ministers identified and disclosed all of the information they held falling within the scope of the Applicant's request.

While the Commissioner is satisfied that the information on making a complaint about the service provided by the Ministers was exempt from disclosure under section 25(1) of FOISA (and that an appropriate link to the information was provided by the Ministers), he finds that the Ministers breached section 16(1)(c) of FOISA by failing to notify the Applicant that they were applying this exemption.

Appeal

Should either the Applicant 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.

Daren Fitzhenry
Scottish Information Commissioner

21 March 2022

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.
...
- (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 –
 - (a) the provision does not confer absolute exemption; and
...
- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –
 - (a) section 25;
...

16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
...
 - (c) specifies the exemption in question; and
...

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.

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Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info