



Decision Notice 141/2022

Advice on the proliferation of nuclear warheads

Applicant: The Applicant

Authority: Crown Office and Procurator Fiscal Service

Case Ref: 202101534

Summary

The Applicant asked the Authority whether the Attorney General had consulted it or the Lord Advocate when preparing specified legal advice or whether the Attorney General had provided it or the Lord Advocate with a copy of that advice. The Authority told the Applicant that it did not hold the information. Following an investigation, the Commissioner was satisfied that this was the case.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) (Notice that information is not held); 29(1)(c) (Formulation of Scottish Administration Policy etc.); 47(1) and (2) (Application for decision by Commissioner); 48(c) (When application excluded)

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 9 May 2021, the Applicant made a request for information to the Authority. He referred to a Parliamentary Debate during which the Secretary of State for Defence [stated](#):

*On the nuclear deterrent, we do not believe that the changes to the number of warheads in any way breach the nuclear non-proliferation treaty, and that advice is backed up by the Attorney General.*¹

2. The Applicant asked the Authority whether:
 - It or the Lord Advocate was consulted by the Attorney General in the preparation of this advice to the UK government
 - the Attorney General provided it or the Lord Advocate with a copy of this advice.
3. The Authority responded on 8 June 2021. It advised the Applicant that the information was exempt from disclosure as it may reveal whether the Law Officers have, or have not, provided advice on a particular issue. The Authority said this would breach the long standing convention, reflected in the [Scottish Ministerial Code](#)², preventing the Scottish Government from revealing whether Law Officers have or have not provided legal advice on any matter.
4. On 27 June 2021, the Applicant wrote to the Authority, requesting a review of its decision. He did not agree that the exemption applied.
5. The Authority initially confirmed its original decision. However, following an application to the Commissioner, it issued a revised review response on 13 December 2021. The Authority advised the Applicant that it did not hold recorded information which would allow it to respond to his requests.
6. On 15 December 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant believed that the Authority did hold the information, particularly given its initial response which suggested that it did hold the information.

Investigation

7. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions.

Commissioner's analysis and findings

9. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
10. As noted above, the Applicant believed that the Authority did hold the information, given its initial response to his request, which suggested that the exemption in section 29(1)(c) applied. (Where an authority does not hold information, it must either notify the requester

¹ <https://www.theyworkforyou.com/debates/?id=2021-03-22d.643.2>

² <https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/>

that the information is not held (section 17(1)) unless it wishes, under section 18(1) of FOISA, to refuse to confirm or deny whether the information is held or exists.)

11. The Authority changed its approach and notified the Applicant that it did not hold the information.
12. The Authority advised the Commissioner it is entrusted with the processing of reported crimes and preparation of criminal cases for court. It is also responsible for investigating all sudden, suspicious, accidental or unexplained deaths.
13. The legal advice referred to in the request does not concern any aspect of the Authority's remit and, as such, it would have no reason to hold the information (i.e. whether it or the Lord Advocate was consulted by the Attorney General in the preparation of this advice to the UK government or whether the Attorney General provided the Lord Advocate or it with a copy of the advice).
14. The Authority referred to the [role of the Lord Advocate](#)³. As well as being the head of the systems of criminal prosecution and investigation of deaths in Scotland (as a result of which the Lord Advocate is head of the Authority), the Lord Advocate:
 - (i) is principal legal advisor to the Scottish Government
 - (ii) represents the Scottish Government in civil proceedings and
 - (iii) represents the public interest in a range of statutory and common law civil and constitutional functions.
15. These three roles are carried out by the Lord Advocate on behalf of the Scottish Government and not as the head of the Authority. The Scottish Government is independent of the Authority. If a discussion were held with the Attorney General, the Lord Advocate would have undertaken this on behalf of the Scottish Government rather than on behalf of the Authority.
16. The Commissioner notes that the Lord Advocate is a Minister in the Scottish Government and that the Authority is independent of the Scottish Government. While information held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland would, for the purposes of FOISA, be held by the Authority⁴, the Commissioner is satisfied, given the subject matter of this request, that any information falling within the scope of this request, if held and if it existed, would be held by the Scottish Government and not by the Authority.
17. He is therefore satisfied that the Authority was entitled to notify the Applicant, in line with section 17(1) of FOISA, that it does not hold the information.
18. The Commissioner is aware that the Applicant subsequently made the same request to the Scottish Government.

³ <https://www.gov.scot/publications/lord-advocate-role-and-functions/>

⁴ Although section 48(c) of FOISA would apply in this case and the Commissioner would not be able to carry out an investigation.

Decision

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

Appeal

Should either the Applicant or the Authority 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

12 December 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

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.
- (2) Subsection (1) is subject to section 19.
- (3) Subsection (1) does not apply if, by virtue of section 18, the authority instead gives the applicant a refusal notice.

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to -
...
 - (c) the provision of advice by any of the Law Officers or any request for the provision of such advice; ...

47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
 - (a) a notice under section 21(5) or (9); or
 - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

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

- (2) An application under subsection (1) must -
- (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
 - (b) state the name of the applicant and an address for correspondence; and
 - (c) specify –
 - (i) the request for information to which the requirement for review relates;
 - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and
 - (iii) the the matter which gives rise to the dissatisfaction mentioned in subsection (1).

...

48 When application excluded

No application may be made to the Commissioner for a decision under section 47(1) as respects a request for review made to –

...

- (c) the Lord Advocate, to the extent that the information requested is held by the Lord Advocate as head of the systems of criminal prosecution and investigation of deaths in Scotland.