

Decision Notice



Decision 099/2012 Tom Gordon of the Sunday Herald and the Scottish Ministers

Establishment of a Scottish intelligence service or services

Reference No: 201200274 and 201200275
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Summary

Mr Gordon asked the Scottish Ministers (the Ministers) to provide information relating to the establishment of both a domestic and an overseas Scottish intelligence service, or secret intelligence service, either within the devolution settlement or following Scottish Independence. The Ministers decided to withhold the information under section 29(1)(a) of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, the Ministers upheld their decision. Mr Gordon remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had wrongly withheld the information under section 29(1)(a) of FOISA, and required the Ministers to provide it to Mr Gordon.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 29(1)(a),(3) and (4) (definition (a) of “government policy”) (Formulation of Scottish Administration policy etc.)

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

1. On 28 September 2011, Mr Gordon made two separate information requests to the Ministers, for the following information:
 - a. “...all items of information held by the Scottish Executive’s justice department related to the establishment of a domestic Scottish Intelligence Service, or Secret Intelligence Service, whether within the devolution settlement or following Scottish Independence.”
 - b. “...all items of information held by the Scottish Executive’s justice department related to the establishment of an overseas-focused Scottish Intelligence Service, or Secret Intelligence Service, whether within the devolution settlement or following Scottish Independence.”

Mr Gordon specified that both requests should cover information in all papers relating to such a service, all presentations, and all correspondence whether in hard copy or digital format.



2. The Ministers responded to request a. on 24 October 2011 and (in identical terms) to request b. on 27 October 2011. They advised that the information covered by the request was exempt from disclosure under section 29(1)(a) of FOISA, as the information related to the formulation or development of government policy. They found that the public interest in upholding the exemption outweighed the public interest in disclosing the information.
3. On 2 November 2011, Mr Gordon applied separately for a review of the Ministers' decision on each of his requests.
4. The Ministers failed to respond to either request for review within the statutory 20 working day period, and Mr Gordon applied to the Commissioner for a decision in each case. On 2 February 2012, the Ministers issued a review response in relation to each request, upholding the decision to withhold information under section 29(1)(a) of FOISA.
5. Mr Gordon then made two fresh applications for a decision from the Commissioner, on 31 January 2012 (request b.) and 14 February 2012 (request a.).
6. The applications were both validated, by establishing that in each case a request for information had been made to a Scottish public authority and an application made to the Commissioner for a decision only after the authority had been asked to review its response to that request.

Investigation

7. The Ministers were notified in writing that an application had been received from Mr Gordon and were asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the cases were then allocated to an investigating officer.
8. The two cases were conjoined for the purpose of this decision, because the subjects of requests are so closely related and because the same information has been withheld in each case.
9. The investigating officer subsequently contacted the Ministers and invited them to provide any comments they wished to make on the application, as required by section 49(3)(a) of FOISA. The Ministers were asked to:
 - comment on the small amount of information that had been identified as falling within the scope of the requests, and the fact that it was all of recent origin;
 - advise whether other related or separate correspondence had been considered in relation to Mr Gordon's requests, given that one of the documents was an email which appeared to have been forwarded from another person and to make reference to a previous communication;



- comment on the adequacy of the searches carried out for information covered by Mr Gordon's requests, and provide details of those searches;
 - provide any additional arguments or information which would support the decision to withhold the information under section 29(1)(a) of FOISA (including consideration of the public interest test).
10. The Ministers responded to the above request for comments. Subsequently, clarification was obtained from the Ministers in relation to certain points.
11. The relevant submissions received from both the Ministers and Mr Gordon will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her on behalf of Mr Gordon and by the Ministers and is satisfied that no matter of relevance has been overlooked.

Whether all relevant information was identified

13. The Ministers identified three documents as containing information covered by Mr Gordon's requests, dating from September and October 2011. During the investigation, the Ministers were asked why so little information had been identified as falling within the scope of Mr Gordon's requests.
14. The Ministers explained that "National Security" was an area reserved to the UK Government in terms of the Scotland Act 1998: therefore, there had been no need to create documentation relating to the creation of either a domestic or overseas-focused intelligence service. Recent consideration of Scotland's future position in the event of a vote for independence had necessitated the consideration of policies on a number of reserved areas, including national security (which in turn required consideration of how intelligence might be gathered to maintain that security). The Ministers advised that this work began in the autumn of 2011, with initial scoping of policy areas beginning in September. Prior to this time, they explained, there was no policy required on a Scottish intelligence service.



15. In relation to the adequacy of the searches carried out to identify relevant information, the Ministers commented that only one unit within the Scottish Government would have any dealings with the information covered by the requests, and only a small number of people within the team would have the relevant clearances to undertake the work. Searches of the filing system had not been undertaken as it was considered that one named official would hold all relevant information. However, following Mr Gordon's application to the Commissioner, a search of the Government's electronic document storage system (eRDM) had also been carried out. This search had retrieved a considerable amount of documentation relating to "security issues", but none of the information was identified as falling within the scope of Mr Gordon's requests.
16. In light of the explanations put forward by the Ministers, the Commissioner accepts that the information in the three documents under consideration represents the information covered by Mr Gordon's requests and held by the Ministers when they received his requests for information.

Section 29(1)(a) of FOISA

17. The Ministers decided that all the information in the three documents was exempt from disclosure under section 29(1)(a) of FOISA.
18. Under section 29(1)(a) of FOISA, information held by the Scottish Administration (which includes the Ministers) is exempt information if it relates to the formulation or development of government policy. The Commissioner takes the view that "formulation" suggests the early stages of the policy process where options are identified and considered, risks are identified, consultation takes place and recommendations and submissions are presented to Ministers. "Development" suggests the processes involved in reviewing, improving upon or amending existing policy: it can involve piloting, monitoring, analysing, reviewing or recording the effects of that existing policy.
19. For information to fall under this exemption, it need only "relate" to the formulation or development of government policy.
20. Given the only possible context in which the establishment of such organisations might be considered by them (the preparation for policy proposals to address the possibility of independence), the Ministers submitted that Mr Gordon's requests related not only to policy formulation on a Scottish intelligence service, but also to wider policy development in relation to constitutional change. As the relevant functions were reserved under the Scotland Act 1998, they argued that there was no reason for the Scottish Government to be considering the establishment of a domestic or overseas-focused intelligence service other than in such a context.
21. The Ministers provided reasons why the information in each of the three documents should be considered to relate to the formulation of policy. As these reasons relate to the specific content of the withheld information, the Commissioner cannot discuss them in any detail in this decision.



22. Having considered the withheld information and the Ministers' arguments, the Commissioner accepts that all the withheld information is information which relates to the formulation of government policy and, therefore, that it falls within the scope of the exemption in section 29(1)(a) of FOISA.
23. The exemption in section 29(1)(a) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Having decided that the information is exempt under section 29(1)(a), the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.

Public interest test – submission from the Ministers

24. The Ministers acknowledged, in principle, a general public interest in transparency of Government in relation to all information, and in ensuring that information is accessible and that public authorities can be held to account in this regard. They also recognised that any decision to create an organisation would involve a cost to the public purse, that the creation of any security organisation would need to balance security with Human Rights and other policy responsibilities, and that disclosure could provide opportunity for debate.
25. However, the Ministers also highlighted that the formulation or development of policy on either organisation related to national security. It was important for any decisions made to be included in any strategy to be taken forward to protect Scotland and its interests in the event of independence. Consequently, there was a public interest in ensuring that the formulation and development of a national security policy could be undertaken in a free and frank manner. In order to ensure a coherent, cohesive policy which maintained the safety of Scotland, officials and Ministers required an environment which was well informed and based on evidence, safe for those offering advice and direction, and private, in order for all options to be considered and accepted or rejected. The Ministers considered that their ability to develop a coherent policy would be jeopardised if they were not able to discuss options in private with experts.
26. As the requests related to the formulation of policy on proposals for independence, the Ministers argued that any final policy position would form part of the detailed proposals for independence due to be published in November 2013. The Ministers anticipated that these proposals would be subject to detailed scrutiny and debate at that point. They acknowledged that it was in the public interest to ensure that appropriately considered policy was available for an informed public debate at that stage.
27. The Ministers also asked the Commissioner to note that should the referendum result in a vote for independence, the details of policy proposals were likely to be the subject of negotiation between the Scottish and UK Governments. Each government would have a direct interest in the activities of the other, in relation to national security, and to reveal details of how Ministers had arrived at policy decisions, including information about the extent or sources of Scottish Government knowledge on each issue, would be likely to have a material bearing on those negotiations. It might influence the outcome, and possibly the terms, of an independence settlement.



28. The Ministers acknowledged the small volume of information being withheld, but took the view that it would be premature to release the information even though the content of the documents might be considered “fairly innocuous” and even though there was some public interest value in acknowledging that policy formulation was under way.
29. When considering whether information is exempt under section 29(1)(a) of FOISA, section 29(3) requires the Scottish Administration (the Ministers) to have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.
30. The Ministers confirmed that they had considered section 29(3) in relation to certain information and, while acknowledging its content, considered the public interest to lie in ensuring that there was a “private space” for policy deliberations. The Ministers also identified a public interest in ensuring that possible future intergovernmental negotiations or settlement over the issues in question were not affected by the release of factual information which formed part of private deliberations.

Public interest test – Mr Gordon’s views

31. Mr Gordon argued that there was an over-riding public interest in information relating to the potential establishment of a Scottish domestic or overseas intelligence service. Besides representing a major financial commitment, he considered the role and reach of such services to be obvious matters of public interest, likely to generate debates on matters such as policing and civil liberties.

Public interest test – the Commissioner’s conclusion

32. The Commissioner notes the Ministers’ description of the withheld information as “fairly innocuous”. She accepts this characterisation: there is nothing a reasonably intelligent and informed person would not expect to be present in terms of the scope of the issues under consideration. In the circumstances, she does not find that the withheld information would be likely to generate debates on matters of great public interest, such as policing or civil liberties. The information relates to an early, fact-finding, stage of policy formulation and is extremely limited in scope.
33. On the other hand, neither does the Commissioner accept that disclosure of the withheld information would, in itself, be likely to prejudice future intergovernmental negotiations or settlement. The information would provide only minimal details of how Ministers reached any policy decision (once taken) on the establishment of an intelligence service or services, or the extent or sources of their knowledge on this matter.
34. The Commissioner has considered the Ministers’ arguments on the public interest in preserving a “private space” for policy deliberations, but does not accept that these are compelling in relation to the withheld information, for the reasons given in paragraph 33 above.



35. On balance, having considered all relevant submissions and the withheld information, the Commissioner finds that the general public interest in providing access to information held by Scottish public authorities, promoting openness and transparency, outweighs any competing public interest in maintaining the exemption in section 29(1)(a) of FOISA.

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) in responding to the information requests made by Mr Gordon. She finds that by withholding information under the exemption in section 29(1)(a) of FOISA, the Ministers failed to comply with section 1(1).

The Commissioner therefore requires the Ministers to provide Mr Gordon with the withheld information, by 2 August 2012.

Appeal

Should either Mr Gordon or the Scottish Ministers wish to appeal against this decision, there is an 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
Head of Enforcement
18 June 2012



Appendix

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.

...

- (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.

...

29 Formulation of Scottish Administration policy etc.

- (1) Information held by the Scottish Administration is exempt information if it relates to -

- (a) the formulation or development of government policy;

...

...

- (3) In determining any question under section 2(1)(b) as respects information which is exemption information by virtue of subsection (1)(a), the Scottish Administration must have regard to the public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the taking of a decision.



- (4) In this section -
- “government policy” means -
- (a) the policy of the Scottish Administration;
- ...