

# Decision Notice

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## Decision 248/2014: Mr X and the Scottish Ministers

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### Agreement in respect of privileged correspondence

Reference No: 201402002

Decision Date: 27 November 2014



Scottish Information  
Commissioner

## Summary

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On 15 May 2014, Mr X asked the Scottish Ministers (the Ministers) for information supporting their understanding of an agreement in respect of privileged correspondence. The Ministers informed Mr X that his solicitor had already been furnished with the information he was seeking. It cited section 25(1) of FOISA because it considered Mr X could reasonably obtain the information other than by requesting it under FOISA.

Following an investigation, the Commissioner was satisfied that the Ministers were entitled to rely on section 25(1) of FOISA in the circumstances.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 15(1) (Duty to provide advice and assistance); 21(1) (Review by Scottish public authority); 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

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1. On 15 May 2014, Mr X made a request for information to the Scottish Government Legal Directorate (part of the Ministers) for “all and any information held by your authority supporting your understanding of the agreement to which you assert in [para 10](#) of your letter of 18 March 2014 that SLAB [Scottish Legal Aid Board] is a party.”
2. Mr X wrote again to the Ministers on 5 July 2014, complaining that he had not received a response to his request and asking for a review.
3. The Ministers notified Mr X of the outcome of their review on 5 August 2014, apologising for their earlier failure to respond. They withheld the information Mr X requested under section 25(1) of FOISA. They argued the information was reasonably accessible to Mr X because it had already been provided to his solicitors in the context of Court proceedings
4. On 8 August 2014 Mr X wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA.
5. The application was validated by establishing that Mr X made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request. The case was then allocated to an investigating officer.

## Investigation

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6. On 20 August 2014, the Ministers were notified in writing that Mr X had made a valid application.

7. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were asked to provide the Commissioner with the withheld information and to comment on Mr X's application. Specifically, they were asked to explain how the information was reasonably obtainable by Mr X, for the purposes of section 25(1).

## **Commissioner's analysis and findings**

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8. 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 Mr X and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Section 25(1)**

9. 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. The Ministers confirmed that they were applying section 25(1) to the information requested by Mr X.
10. During the investigation, the Ministers provided the withheld information they considered to fall within the scope of the request and the dates on which it was provided to Mr X's solicitors. The Ministers believed it clear that the information already sought by, and provided to, Mr X's solicitors (acting on his behalf) in the context of the Court proceedings was the same information as he was seeking here. Consequently, it was reasonably obtainable by him.
11. Mr X was asked by the investigating officer if and how he believed the information sought and provided in the Court proceedings differed from the information sought in this request. He did not believe this question to be relevant to his request.
12. Mr X explained that he was seeking to establish whether an agreement of the kind referred to in his request actually existed. He believed this was a matter for the Commissioner to determine, in considering whether the Ministers held any information falling within the scope of his request. If no such information was held, he contended, the Ministers could not apply section 25(1).
13. The Commissioner has considered the wording of Mr X's request, alongside that of the Specification of Documents lodged by his solicitors as part of the Court proceedings. Mr X does not appear to be suggesting that the agreement referred to in paragraph 1 of that Specification is not the agreement referred to in the request under consideration here. It appears to be acknowledged that they are the same agreement. The Ministers purported to respond to the Specification as a whole, by providing Mr X's solicitors with the information they consider, in this case, to be the information requested by Mr X.
14. Mr X's request seeks information "supporting your [i.e. the Ministers'] understanding" of the agreement. Clearly, from the Ministers' submissions in this case and their response to the Specification of Documents, this is the information they hold supporting their understanding of the agreement. In the circumstances, it is not for the Commissioner to determine whether the collection of documents containing the information is capable of amounting to an agreement in law. Neither is it for her to determine whether the Ministers complied fully with an Order of the Court, or to determine other matters (such as the existence of an agreement, as a question of law) which the Court may be called upon to consider in time. The

Commissioner is satisfied that the information identified by the Ministers is the information requested by Mr X – the information supporting their understanding of the agreement – and does not, in the circumstances, need to go beyond that.

15. Mr X does not dispute that the information was provided to his solicitors as the Ministers have described. He appears to acknowledge that this information was in fact accessible to him. In the circumstances, the Commissioner takes the view that the information requested by Mr X could be reasonably obtained by him other than by requesting it under section 1(1) of FOISA. Therefore, she is satisfied that the Ministers were entitled to withhold it under section 25(1) of FOISA.

### **Section 15 – duty to provide advice and assistance**

16. Mr X also complained in his application that he was not given sufficient assistance to identify the specific information he was seeking from that provided in response to the Specification.
17. The Ministers did not consider the information provided in response to the Specification to be complex, voluminous or difficult to read. It noted that this was information sought by Mr X and believed he understood clearly what he was seeking. It submitted that the information provided to his solicitors, including the covering letter, Certificate and Inventory of Documents, provided adequate assistance in the circumstances.
18. Section 15(1) of FOISA provides that a Scottish public authority must, so far as it is reasonable to expect it to do, provide advice and assistance to a person who has made, or proposes to make, a request for information to it. The Commissioner acknowledges that she has, in appropriate cases, required authorities to provide such assistance with a view to enabling applicants to identify information to which section 25(1) applies.
19. In this case, the Commissioner notes that Mr X was able to comment in some detail on individual items provided to his solicitors. He appeared to have a good understanding of this information. She also acknowledges that it cannot be described as complex, voluminous or difficult to read.
20. The Commissioner is satisfied that the Ministers gave all the advice and assistance they could reasonably be expected to give in the circumstances of this case. She believes it would be going too far in the circumstances to expect them to do more by way of compliance with section 15(1), for example (as Mr X appears to expect) to go into detail on what was considered to constitute an agreement and why.

### **Timescales**

21. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days following the date of receipt of the request to comply with a request for information, subject to qualifications which are not applicable in this case. Section 21(1) requires public authorities to issue their review decision within 20 working days of receipt of the requirement for review, again subject to qualifications which are not relevant here.
22. Mr X complained in his application about the Ministers' initial failure to respond to his request. Responding to his requirement for review, the Ministers acknowledged this failure and apologised for it. The Commissioner does not find it necessary to consider this matter any further here.
23. Mr X also complained that the Ministers' review outcome (dated 5 August 2014) was late. Mr X submitted his requirement for review by fax on a Saturday. The first working day thereafter was Monday 7 July 2014, so the 20 working day period started then. The Ministers should

have responded on 1 August 2014, but did so on 5 August. In other words, they failed to comply with section 21(1) of FOISA. In the circumstances, the Commissioner does not require the Ministers to take any action on this point.

## Decision

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

She finds that the Ministers were entitled to apply section 25(1) FOISA to the request (and, in doing so, provided such advice and assistance as it was reasonable to expect in the circumstances). In failing to respond to Mr X's requirement for review within 20 working days, however, the Ministers failed to comply with section 21(1) of FOISA.

## Appeal

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Should either Mr 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**  
**Head of Enforcement**

**27 November 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 –

- (a) the provision does not confer absolute exemption;

...

- (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;

...

#### 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.

...

#### 21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

#### 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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