

# Decision Notice

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## Decision 018/2016: Mr Gordon and Scottish Ministers

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### Creation of a Scottish Monetary Authority

Reference No: 201501180

Decision Date: 28 January 2016



Scottish Information  
Commissioner

## Summary

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On 25 March 2015, Mr Gordon asked the Scottish Ministers (the Ministers) for information relating to the creation of a Scottish Monetary Authority. The Ministers informed Mr Gordon that they did not hold the information he sought.

The Commissioner investigated. She accepted that the Ministers did not hold the information Mr Gordon asked for, but she also found that they failed to comply with the relevant statutory timescale for responding to requests.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 10(1)(a) (Time for Compliance); 17(1)(Notice that information is not held)

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 25 March 2015, Mr Gordon made a request for information to the Ministers. The information requested was:  
  
“... all items of information held since 1 Jan 2013 by the First Minister’s office (both in relation to Alex Salmond and Nicola Sturgeon’s occupancy), the Finance Directorate and the Finance Secretary’s Office in relation to the potential creation of a Scottish Monetary Authority.”  
  
Mr Gordon explained that the response “should include all material related to the potential appointment of the economist Professor John Kay to lead such an authority, as discussed in Mr Salmond’s book *The Dream Shall Never Die* and all related correspondence, both internal and with others outside the Scottish Government.”
2. On 12 May 2015, Mr Gordon wrote to the Ministers, requiring a review on the basis that they failed to respond within the statutory timescale.
3. The Ministers notified Mr Gordon of the outcome of their review on 11 June 2015. They informed Mr Gordon that they held no information within the scope of Mr Gordon’s request, but made no mention of the delay in responding.
4. On 18 June 2015, Mr Gordon wrote to the Commissioner. He applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr Gordon stated he was dissatisfied with the failure to respond within statutory timescales and explained why he did not accept that there was no information held.

## Investigation

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5. The application was accepted as valid. The Commissioner confirmed that Mr Gordon made a request for information to a Scottish public authority and asked the Ministers to review their response to that request before applying to her for a decision.

6. On 7 September 2015, the Ministers were notified in writing that Mr Gordon had made a valid application. The case was then allocated to an investigating officer.
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 invited to comment on this application and answer specific questions on their interpretation of the request and the searches carried out.
8. Submissions were received from the Ministers. Having considered the submissions, the investigating officer asked for further searches to be undertaken. The Ministers responded with details of these.

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

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9. 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 Gordon and the Ministers. She is satisfied that no matter of relevance has been overlooked.

### **Information held by the Ministers**

10. 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, subject to 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.
11. In his application, Mr Gordon was unconvinced that the Ministers had identified and located all the information they held and which was capable of addressing his request. He provided examples of statements he believed supported his expectations, referring in particular to extracts from Mr Salmond's book and a reference in the report of the Fiscal Commission Working Group. He submitted that the idea of a Scottish Monetary Authority was discussed in the relevant departments, highlighting the gravity of the subject.
12. At this point, the Commissioner must note that Mr Gordon stipulated three locations (within the Scottish Government) in his request. Having considered the terms of the request, and bearing in mind that Mr Gordon is an experienced political journalist, the Commissioner is satisfied that the request was confined to these three locations (that is, the First Minister's Office, the Finance Directorate and the Finance Secretary's Office) and the Ministers were not required to search anywhere else.
13. In the course of the investigation, Mr Gordon also queried whether the information might have been destroyed after three months (the period after which correspondence held by Ministers' private offices is routinely destroyed). This does not appear to be a suggestion that information has been destroyed other than routinely, in accordance with the applicable retention schedules: as such, and particularly in the absence of any suggestion that information has been destroyed after the Ministers received the request, this is not something the Commissioner can consider as a potential failure to comply with either FOISA or recognised good practice..
14. The Ministers described the searches they had conducted, using the terms "Scottish Monetary Authority", "Monetary Authority" and "John Kay". These covered all files in their electronic database (eRDM) and also email inboxes for staff in the locations specified in the request. The Ministers provided evidence of the searches carried out.

15. The Ministers confirmed that they had no record of any information relating either to a Scottish Monetary Authority or to Professor John Kay having been routinely destroyed since 1 January 2013. They provided some clarification of Professor Kay's role in relation to the Scottish Government, and also explained that the Finance Directorate would not have led on any work relating to the establishment of a Scottish Monetary Authority.
16. The Commissioner is satisfied that the searches and other enquiries undertaken by the Ministers were adequate in the circumstances, bearing in mind the scope of the request and having considered all other relevant submissions. She notes that Ministerial private offices would not retain information of this kind for longer than three months, it being the responsibility of the policy area concerned to save records in eRDM, where necessary.
17. In all the circumstances, therefore, the Commissioner is satisfied with the Ministers were entitled to conclude that they held no information falling within the scope of Mr Gordon's request.

### **Failure to comply with timescales in FOISA**

18. In his application to the Commissioner, Mr Gordon expressed dissatisfaction that the Ministers failed to respond to his request within the prescribed timescale.
19. Section 10(1) of FOISA gives a Scottish public authority a maximum of 20 working days following receipt of an information request to respond to that request, subject to qualifications which do not apply here. In this case, the Ministers failed to respond to the request within that period and consequently breached the requirements of section 10(1). The question of delay was not addressed in the outcome of the Ministers' review, dated 11 June 2015.
20. The Commissioner notes the apology issued to Mr Gordon by email (dated 28 April 2015) which contained an explanation of the delay but was no more than a "holding" response. She recognises the apology as going some way towards meeting good practice, but would also draw the Ministers' attention to advice provided at paragraph 4.8.2 of their Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs<sup>1</sup>, which recommends giving an estimated response date in such circumstances.

## **Decision**

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The Commissioner finds that the Scottish Ministers partially failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Gordon.

The Commissioner accepts the Ministers did not hold information which fell within the scope of Mr Gordon's request. However, she also finds that the Ministers failed to comply with the required timescale for responding to Mr Gordon's request, thereby breaching section 10(1) of FOISA.

Given Mr Gordon received an apology for the delay at the time, the Commissioner does not require any action on the part of the Ministers in relation to the timescale breach, in response to Mr Gordon's application.

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<sup>1</sup> <http://www.gov.scot/Resource/0046/00465757.pdf>

## **Appeal**

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Should either Mr Gordon 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.

**Margaret Keyse**  
**Head of Enforcement**

**28 January 2016**

## Appendix 1: Relevant statutory provisions

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### 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.

...

#### 10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –

- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or

...

#### 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.

**Scottish Information Commissioner**

Kinburn Castle  
Doubledykes Road  
St Andrews, Fife  
KY16 9DS

t 01334 464610

f 01334 464611

[enquiries@itspublicknowledge.info](mailto:enquiries@itspublicknowledge.info)

**[www.itspublicknowledge.info](http://www.itspublicknowledge.info)**