

Decision Notice 122/2021

Ipsos Mori polling information

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202001522



Scottish Information
Commissioner

Summary

The Ministers were asked for information received or sent between 11 and 15 October 2020, which related to the Ipsos MORI/STV News polling.

The Ministers disclosed some information, but notified the Applicant it did not hold records of phone calls or of WhatsApp and SMS messages.

The Commissioner investigated and accepted that the Ministers did not hold this information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 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

1. On 15 October 2020, the Applicant made a request for information to the Scottish Ministers (the Ministers). The information requested was:
 - (i) Any Scottish Government emails from 11-15 October 2020 (inclusive), either internal or external, concerning polling by Ipsos Mori/STV News or news inquiries or news coverage related to this polling. Please also include attachments to these emails.
 - (ii) Any briefings or notes provided to Scottish Government Ministers, electronic or on paper, from 11-15 October 2020 (inclusive), concerning polling by Ipsos Mori/STV News or news inquiries or news coverage related to this polling. Please also include any replies by Ministers or their Special Advisers.
 - (iii) Records of any phone calls made from or received by Scottish Government phones (landlines or mobiles) from 11-15 October 2020 (inclusive), concerning polling by Ipsos Mori/STV News or news inquiries or news coverage related to this polling.
 - (iv) Copies of any SMS or WhatsApp messages sent by Scottish Government special advisers from 11-14 October 2020 (inclusive) concerning polling by Ipsos Mori/STV News or news inquiries or news coverage related to this polling.
2. The Ministers responded on 12 November 2020 and provided the Applicant with information falling within the scope of requests (i) and (ii). The Ministers also notified the Applicant that they did not hold any information falling within the scope of requests (iii) and (iv). They explained that there were no records of phone calls made or received by Scottish Government phones (landlines or mobiles) between 11 and 15 October 2020 (inclusive), nor any SMS or WhatsApp messages sent by Scottish Government special advisers between 11 and 14 October 2020 (inclusive) regarding the Ipsos MORI/STV News poll.

3. Later the same day, the Applicant wrote to Ministers requesting a review of their decision that they did not hold information relating to requests (iii) and (iv). The Applicant argued that he did not believe that the Scottish Government had conducted a thorough enough search for SMS or WhatsApp messages sent by Scottish Government special advisers (SpAds) from 11-14 October 2020 (inclusive).
4. The Ministers notified the Applicant of the outcome of their review on 15 December 2020, upholding their original decision without modifications.
5. On 16 December 2020, 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 suspected that they had not searched for any WhatsApp or SMS messages and he questioned their position that no record of phone calls was held.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 19 January 2021, the Ministers were notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. 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 regarding their reliance on section 17(1) of FOISA.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner 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.

Section 17(1) - Information not held

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. This is subject to qualifications, but these are not applicable here. If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.

Submissions from the Applicant

11. The Applicant argued that information falling within the scope of his request may exist in the form of WhatsApp or SMS messages, but that the Ministers had failed to look for such information, let alone disclose it. He further argued that his request was specific and limited and would have been easy to search for.
12. The Applicant submitted that he was not satisfied with the Ministers' justification for not searching for, or releasing SpAD's WhatsApp and/or SMS messages, especially as these may have been sent from Scottish Government phones. The Applicant also expressed concern that no records of phone calls were found.

Submissions from the Ministers

13. The Ministers submitted that the Directorate for Constitution and Cabinet, Communications News and the First Minister's Policy Delivery Unit were most likely to hold information falling within the scope of the request, in addition to the SpAds which were covered by request (iv). The Ministers provided a list of the individuals which were contacted and asked to conduct searches for information relevant to the requests; these included the Deputy Director for Constitutional Relations, Head of Economic Policy, Head of Elections and Freedom of Information Division and the Head of Cabinet, Parliament and Governance Division.
14. The Ministers provided evidence that nil returns were confirmed by the First Minister's Policy Delivery Unit, Communications News, Elections and FOI Division, Cabinet, Parliament and Governance Division, Constitution and UK Relations Division and SpAds. The Ministers submitted that the Strategic Analysis Team (now called Constitution and External Affairs Analysis) also conducted searches and they identified two emails and part of a briefing that was previously disclosed to the Applicant in response to requests (i) and (ii).
15. The Ministers explained that they conducted a search of their electronic records management system, using the terms "Ipsos MORI poll independence 2020" and "Ipsos MORI STV news poll 2020" but that neither search identified any information that fell within the scope of the request.
16. With specific reference to request (iii), the Ministers explained that they do not have any specific guidance or policy regarding the use and retention of telephone conversations. However, their Records Management Policy makes it clear to staff that any information which provides evidence of a transaction or decision carried out by or on behalf of the Scottish Government (including telephone conversations and SMS messages) must be stored on their electronic Records and Document Management (eRDM) system as part of the corporate record.
17. The Ministers clarified that there is no requirement for the Scottish Government to retain information that has no value to the corporate record, such as notification emails, emails of a personal nature or containing information relating purely to the logistical arrangements for a meeting or event.
18. The Ministers were asked to check whether there was any mention of a telephone conversation in SMS or WhatsApp messages received or communicated by Scottish Government staff (request (iii)).
19. In response, the Ministers contended that they did not consider any SMS or WhatsApp messages sent by Scottish Government phones, other than those sent by SpAds as requested in request (iv) to fall within the scope of the request. The Ministers argued that the Applicant had clearly set out the type of communication method and relevant parties in each part of his four-part request and in doing so he had only requested information held by SMS or WhatsApp messages in the fourth part of his request which is limited to Scottish Government SpAds. The Ministers maintained that the information covered by request (iii) is limited to that of phone calls recorded.
20. The Ministers also stressed that they had shared the wording of the request with relevant officials when commissioning the search for any information held, and that nil returns were confirmed.

21. With specific reference to request (iv) the Ministers submitted that the full wording of the request was shared with the SpAd Private Office and the Head of Communications was asked to complete a search for the requested information, which resulted in a nil response. The Ministers explained that SMS and WhatsApp messages were checked for the date range of the request, but they did not identify any information which would fall within the scope of the request.
22. The Commissioner was not satisfied with the Ministers' submissions regarding requests (iii) and (iv).
23. The Commissioner disputed the Ministers' suggestion that SMS and WhatsApp messages were excluded from request (iii) because the Applicant had not specified this. The Commissioner took the view that, while request (iii) was not seeking copies of SMS or WhatsApp messages by themselves, if any such message held information about a telephone call which had referred to the Ipsos MORI poll, it would fall within the scope of the request. The Commissioner considered it possible that Scottish Government officials may have sent a SMS or WhatsApp message referring to a phone call they had had regarding the Ipsos MORI poll results, and that therefore, their devices should be searched for relevant SMS or WhatsApp messages.
24. In addition, the Commissioner noted that a number of the "nil responses" provided by the Ministers involved a head of department saying "nil" on behalf of their staff, rather than individual responses. While the Commissioner had no reason to doubt the veracity of these departmental "nil responses", he required evidence that each relevant staff member had conducted individual searches.
25. In response, the Ministers referred to their previous submissions of 19 February 2021, where they referred to the searches undertaken for request (iii) and in which they stated; "*The case handler shared the full wording of the request with relevant officials when commissioning the search for any information held. As noted in response to question (i) the case handler received confirmation via nil returns that no relevant information was held.*" The Ministers reiterated that they were satisfied that, as the searches commissioned would have captured the information held in relation to all parts of the request, the nil returns received would have extended to records of telephone conversations relevant to request (iii).
26. However, the Ministers noted that they had now asked all relevant Scottish Government officials to search for records of phone calls on the topic specified in request (iii) that may be held specifically in SMS and WhatsApp messages, created or received between 11 and 15 October 2020.
27. The Ministers subsequently provided the Commissioner with a response from each individual in the three departments that were deemed most likely to hold relevant information, namely the Department for Constitution and Cabinet, Communications; Newsdesk and Communications; First Minister's Policy and Delivery Unit. In each response, the outcome of the searches undertaken by the officials was a "nil response".
28. As indicated above, the Commissioner was also dissatisfied with the responses provided by the Ministers in response to request (iv) and he questioned them further. The Commissioner was concerned that only one SpAd appeared to have conducted searches in relation to request (iv) when, from the list of SpAds published on the Scottish Government website, there appeared to be a number of SpAds that could hold relevant information. The Commissioner subsequently identified five SpAds that he wanted to conduct searches and

he also asked the Ministers to indicate whether each of these SpAds had cloud back up engaged on their devices (and if so, to ensure that it was searched for deleted messages).

29. The Ministers provided the Commissioner with evidence that each of the five named SpAds had carried out searches for any SMS or WhatsApp messages that fell within the scope of request iv). The Commissioner notes that each of these searches returned a “nil response”.
30. The Ministers also explained that they had contacted the Scottish Government’s Information and Technology Services (iTECS) to request details of the backup services applied to corporately managed devices, and iTECS confirmed that “the policies we apply to our corporately managed devices block the use of Android and Apple backup services”. A copy of the email received from iTECS confirming this was provided to the Commissioner. The Ministers reiterated that it would not be possible for individual SpAds to have cloud backup engaged on their mobile devices, so they were not able to restore any messages that had previously been deleted.

Commissioner’s conclusions

31. The Commissioner has carefully considered the submissions made by the Ministers and the points raised by the Applicant. The Commissioner notes that the Applicant made his request on 15 October 2020, and that request (iii) was seeking information sent or received between 11 and 15 October 2020, while request (iv) was seeking information sent or received between 11 and 14 October 2020. The Commissioner also notes that the Ministers first asked their staff to search for information on 22 October 2020, which is only a week after the request was received.
32. Given the ephemeral nature of SMS and WhatsApp messages, and the lack of back up services used by Scottish Government devices, it is possible that information may have existed on 15 October 2020 (the date of the request), which was no longer held on 22 October 2020, when the searches were undertaken by the Ministers.
33. As noted above, the Ministers have referred the Commissioner to its record management plan and have indicated that, due to increased remote working, all staff have been advised to follow simple record management housekeeping guidelines, which it summarised as follows:
“Within these guidelines, once a task or action has been completed staff are encouraged, in a timeously manner:
 - *where information held on any medium has value for the corporate record (eg to evidence and justify key business activities, decisions and actions) to store it within eRDM; or*
 - *where it has no value (such as notification emails, emails of a personal nature or containing information relating only to the logistical arrangements for a meeting/event) to delete it. “*
34. The Ministers’ policy therefore requires all relevant information, regardless of format, to be recorded for the corporate record. However, this does not mean that all staff will adhere to that policy all of the time. The Commissioner is concerned that the Ministers do not appear to have any specific policy with regard to SMS and WhatsApp messages, which may be being created and deleted on a daily basis, with no back up services in place to record such information. While the Commissioner has no powers to require any authority to record specific information, he is concerned that the existing policies of the Scottish Government

could pose difficulties for individuals trying to obtain SMS or WhatsApp messages under FOISA.

35. Given the above, the Commissioner cannot definitively conclude that information was not held by the Ministers on 15 October 2020. However, having taken into account the submissions from the Ministers, he is satisfied, on the balance of probabilities, that the Ministers do not hold the information requested by the Applicant. He finds that the Ministers were therefore correct to give notice, in terms of section 17(1) of FOISA, that they did not hold the information requested.

Decision

The Commissioner finds that the Scottish Ministers 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 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

12 August 2021

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.

...

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.

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