

Decision Notice



Decision 061/2012 Mr David Rule and the Scottish Ministers

First Minister's engagements

Reference No: 201102127
Decision Date: 2 April 2012

www.itspublicknowledge.info

Margaret Keyse

Acting Scottish Information
Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS



Summary

Mr Rule requested from the Scottish Ministers (the Ministers) the engagements of the First Minister from 1 March 2011 to 25 July 2011. The Ministers failed to respond to his initial request and, in response to his review request, the Ministers advised Mr Rule that engagement details from 1 June 2008 to 30 May 2011 were available on the Scottish Government's website, but details of engagements after May 2011 were exempt from disclosure under section 27(1) of FOISA. Mr Rule was dissatisfied with this response and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had failed to deal with Mr Rule's request for information in accordance with Part 1 of FOISA, by incorrectly relying on section 27(1) of FOISA to withhold the information requested by Mr Rule. Given the information now published on the Scottish Government website, she did not require the Ministers to take any action in this particular case.

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); 27(1) (Information intended for future publication)

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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.

Background

1. On 25 July 2011, Mr Rule wrote to the Ministers requesting the engagements of the First Minister from 1 March 2011 to the present day.
2. On 2 September 2011, having received no response to his request, Mr Rule wrote to the Ministers requesting a review of their failure to reach a decision.



3. Mr Rule did not receive a response to his requirement for review and, on 6 October 2011, he wrote to the Commissioner expressing his dissatisfaction and applying for a decision in terms of section 47(1) of FOISA. As a result of that application the Commissioner issued *Decision 224/2011 Mr Rule and the Scottish Ministers*¹.
4. The Ministers notified Mr Rule of the outcome of their review on 10 November 2011. They apologised for the delay in responding to his request and advised him that the First Minister's engagements from 1 June 2008 to 30 May 2011 had been published online, providing a weblink to this information. The Ministers also informed Mr Rule that engagements following May 2011 were exempt under section 27(1) of FOISA as this information was being collated as part of a wider proactive publication exercise.
5. On 14 November 2011, Mr Rule wrote to the Commissioner, stating that he was dissatisfied with the outcome of the Ministers' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Rule had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 21 November 2011, the Ministers were notified in writing that an application had been received from Mr Rule and asked to provide the Commissioner with any information withheld from him. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked (with specific reference to the requirements of section 27(1)) to justify their reliance on any provisions of FOISA they considered applicable to the information requested.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to her by both Mr Rule and the Ministers and is satisfied that no matter of relevance has been overlooked.

¹http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2011/201101898_201101899.asp



10. Mr Rule was dissatisfied with the response received from the Ministers. He argued that the Ministers were incorrect in their application of section 27(1) in response to his review, as an excess of twelve weeks had passed since he made his request.

Section 27(1) Information intended for future publication

11. Section 27(1) provides that information is exempt from disclosure where the following tests are met:
- the information is held with a view to its being published by a Scottish public authority or any other person at a date not later than twelve weeks after that on which the request for the information is made;
 - when the request is made, the information is already being held with that view; and
 - it is reasonable in all the circumstances that the information be withheld from disclosure until the intended publication date.
12. This exemption recognises that, where it is intended to make information available, public authorities should, within reason, have space to be able to determine their own publication timetables and deal with the necessary preparation, administration and context of publication.
13. It should be noted that there is no requirement within section 27(1) that publication must actually take place as planned: only that it must be held with a view to publication at the time the request is received. The exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.

Was publication of the information already planned at the time of the request?

14. In response to the investigating officer's queries, the Ministers advised that there was no set publication date for the information sought by Mr Rule, but that they aimed to publish the information within twelve weeks following completion of a month end, and currently hoped to publish Ministerial engagements three months in arrears.
15. It is key to the application of this exemption to establish that the Ministers had the intention of publishing the information at the time the *request was made*. Section 27(1) cannot apply if the Ministers only decided to publish the information *after* Mr Rule requested it. During debates within the Justice 2 Committee of the Scottish Parliament, there was a discussion of the inclusion of a timescale in section 27(1) of FOISA. It was commented by the then Justice Minister, Jim Wallace, that section 27 "applies only when the authority in question has a publication date in mind" [Col 3234]².
16. In this regard, the Ministers were asked to provide evidence illustrating their intention to publish the information when Mr Rule's request was made (25 July 2011). In the absence of specific evidence relating to the publication of this particular information, they were asked to provide evidence of customary practice, or that there was an established pattern of publication of this type of information.

² <http://www.scottish.parliament.uk/parliamentarybusiness/28862.aspx?r=2020&i=9492&c=346126&s>



17. In response, the Ministers simply directed the investigating officer to the relevant pages of the Scottish Government's website, which they stated had been in place and used for proactively publishing Ministerial engagements since 2008³. No further evidence was provided by the Ministers.
18. On analysis of this website, the investigating officer noted that, at the time of Mr Rule's request (July 2011), engagements up to February 2011 had been published by the Ministers (i.e. publication was approximately five months in arrears). The investigating officer also notes that, by 10 June 2011, monthly records of engagements had been published by the Ministers at intervals of between three and five months. The Ministers submitted that actual timescales for publication since 2008 had varied from three to six months in arrears, although the investigating officer found the variation to be between three and ten months.
19. In this particular case, the Ministers applied the exemption in section 27(1) on 10 November 2011, more than fifteen weeks after Mr Rule had made his request for information.
20. In addition to the pattern of behaviour demonstrated by actual publication, the investigating officer discovered a response to a parliamentary written question which illustrated that the Ministers had the intention of publishing such data, three months in arrears, in January 2011⁴.
21. In the circumstances, the Commissioner acknowledges that the Ministers aspired to publish information of this kind approximately twelve weeks in arrears. Taking account, however, of the whole pattern of the timing of publication since 2008, the Commissioner cannot accept that this aspiration was borne out by actual practice. Given the significant lapses from the twelve-week timescale over a considerable period, the Commissioner does not consider it to have been realistic for the Ministers to argue, at the time of Mr Rule's request, that the information was held with the genuine intention of publication within that period. Consequently, she cannot accept that the information requested by Mr Rule was, at the time his request was made, held with a view to publication by the Ministers not later than twelve weeks thereafter.
22. The Ministers also submitted that the variations in the actual timing of publication were due to other priorities and time constraints on the staff charged with the work, pointing out that only a few staff had the necessary skills and authorisations. They referred to the particular demands on the time and resources of the First Minister's Office. The Commissioner acknowledges that these may well be genuine concerns, which may have had a bearing on the Minister's *ability* to meet the requisite timescale, but cannot accept it should follow that the *intention* to publish within twelve weeks remained, notwithstanding consistent (and significant) failure to meet that timescale.

³ <http://www.scotland.gov.uk/About/14944/Events-Engagements/MinisterialEngagements>

⁴ <http://www.scottish.parliament.uk/parliamentarybusiness/28877.aspx?SearchType=Advance&ReferenceNumbers=S3W-38726&ResultsPerPage=10>



23. As the Commissioner is not satisfied that the information was held with a view to publication within twelve weeks, she does not consider it necessary to go on to consider whether it would have been reasonable in all the circumstances for the information to be withheld from disclosure until the intended date of publication. Neither does she consider it necessary in the circumstances to consider the application of the public interest test.
24. The Commissioner has found that the exemption in section 27(1) of FOISA did not apply in the circumstances. However, as the information requested by Mr Rule has since been published on the Ministers' website, she does not require the Ministers to take any action in this particular case. She notes that the Ministers have re-evaluated the process for publishing information of this kind, with a view to avoiding repeated delays.

DECISION

The Commissioner finds that the Scottish Ministers (the Ministers) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Rule. Specifically, she finds that the Ministers were not entitled to withhold the information Mr Rule had requested under the exemption in section 27(1) of FOISA.

Given that the information under consideration has since been published by the Ministers, the Commissioner does not require the Ministers to take any action in respect of this failure in response to Mr Rule's application.

Appeal

Should either Mr Rule 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 notice.

Margaret Keyse
Acting Scottish Information Commissioner
2 April 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.

...

27 Information intended for future publication

- (1) Information is exempt information if-
- (a) it is held with a view to its being published by-
- (i) a Scottish public authority; or
- (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

- (b) when that request is made the information is already being held with that view; and



- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).

...