

Decision Notice 042/2022

Covid-19 procurement contracts

Applicant: The Applicant

Public authority: Scottish Ministers

Case Ref: 202100917



Scottish Information
Commissioner

Summary

The Ministers were asked about the procurement of contracts relating to Covid-19, about profits made by the SNP through these contracts, and shares held in successful bidding companies by MSPs and their family members.

The Ministers provided information in relation to part of the request and notified the Applicant, under section 17(1) of FOISA, that they did not hold information for the remainder of the request.

The Commissioner investigated and found that the Ministers had complied with FOISA in responding to the request.

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 9 June 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant asked:
 - (i) *What's the procurement for Covid-19 contracts in Scotland?*
 - (ii) *How much is the SNP making from each contract involved in Covid-19?*
 - (iii) *How many politicians have shares in any company involved in government contracts?*
 - (iv) *How many politicians' family members have shares in Covid-19 contracts?*
2. The Ministers responded on 5 July 2021, informing the Applicant that, with regard to points (ii), (iii) and (iv), the information was not held by them. They explained why and signposted him to other possible sources of information and guidance on how to make an information request to the Scottish Parliament. In relation to point (i), the Ministers provided a link to Scottish Government guidance for purchasers from March 2020.
3. On 8 July 2021, the Applicant wrote to the Ministers, requesting a review of their decision on the basis that he did not agree with the application of section 17 of FOISA to his requests.
4. The Ministers notified the Applicant of the outcome of their review on 27 July 2021, upholding their original decision in response to points (ii), (iii) and (iv), reiterating why they did not hold the information, and directing him to other possible sources and guidance on how to make an information request to the Scottish Parliament.
5. On 27 July 2021, 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 (of parts (ii) to (iv) of his request) because he did not agree with the use of section 17, and considered the questions he has asked of a political party were fair and should be in the public domain.

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 16 September 2021, the Ministers were notified in writing that the Applicant had made a valid application. 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. These related to their reasons for concluding that they did not hold the information requested by the Applicant.

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.

Information held by the Ministers

10. The Commissioner's investigation is primarily to ascertain whether the Ministers held information falling within the scope of the request.
11. Section 1(1) of FOISA provides that a person who requests information from a Scottish public authority which holds it is entitled to be given that information by the authority, subject to qualifications which, by virtue of section 1(6) of FOISA, allow Scottish public authorities to withhold information or charge a fee for it. The qualifications contained in section 1(6) are not applicable in this case.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to this effect.
13. The Applicant submitted that he had asked fair questions, the answers to which should be in the public domain. He did not agree that the Ministers did not hold the information requested.
14. The Ministers submitted that the Applicant, in his request, specifically referred to the SNP (part (ii)) and that (especially when part (ii) was read alongside parts (iii) and (iv)) the request related to a political party. They explained that the Scottish Government has no responsibility for political parties, MSPs (parts (iii) and (iv)), their payments or other interest. Given this, they did not consider it necessary to carry out any searches in relation to parts (ii) to (iv) of the Applicant's request, as they did not consider there were any circumstances in which they would be required to keep information relevant to the request.
15. The Ministers highlighted that, in their response and at review, the Applicant was informed of this and directed to the Scottish Parliament, where responsibility for MSPs, their payment and other interests sits. They pointed out that the Scottish Parliament is a completely separate public authority from the Scottish Government, and is responsible for recording details of all MSP interests, including their pay, expenses and declared interests.

16. The Ministers commented that, at review, they had considered the Scottish Government's register of interests, which notes the financial interests and benefits of civil servants: however, as the request was seeking details relating to politicians and their families, no relevant information was identified.

The Commissioner's findings

17. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers, where appropriate any reason offered by the public authority to explain why it does not hold the information. Ultimately, the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
18. It is probably helpful for the Commissioner to highlight that political parties, such as the SNP, are not public authorities for the purposes of FOISA.
19. The Applicant has asked for information relating to a political party, MSPs' payments, other interests and those of their families, which the Ministers have stated does not fall within their remit or responsibility. They have explained that another public authority (the Scottish Parliament) is responsible for MSPs' payments and other interests and provided the Applicant with a link to advice on how to make an information request to the Scottish Parliament.
20. The Commissioner notes that the Ministers have not conducted any searches for the information requested by the Applicant, but, as the Scottish Government is not responsible for MSPs, their payments and other interests, he accepts that searches were not required.
21. The Commissioner acknowledges the Applicant's strong views on the need for accountability, propriety and transparency around the interests of politicians and their families, but a public authority cannot disclose information which it does not hold and, for the reasons outlined above, the Commissioner is satisfied that the Ministers do not hold the information requested by the Applicant.
22. The Commissioner, therefore, is satisfied, on the balance of probabilities, that the Ministers did not hold the information requested, and that they were correct to give the Applicant notice to that effect, under section 17(1) of FOISA.

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 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 April 2022

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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