



# Decision Notice 004/2023

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## Written evidence to James Hamilton's investigation into the First Minister under the Ministerial Code

**Authority: Scottish Ministers**  
**Case Ref: 202100725**

### Summary

The Applicant asked the Authority for all written evidence to James Hamilton's investigation into the First Minister under the Ministerial Code. The Authority argued that it did not hold some of the information and that the information it did hold was exempt from disclosure. The Commissioner investigated and found that the Authority had failed to identify all of the information held by it which fell within scope of the request. He required the Authority to provide a new response to the Applicant.

### Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 3(2) (Scottish public authorities); 47(1) and (2) (Application for decision by Commissioner)

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 13 January 2019, the First Minister referred to the independent advisers on the [Scottish Ministerial Code](#)<sup>1</sup> (the Ministerial Code) the question of whether she had complied with the

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<sup>1</sup> <https://www.gov.scot/publications/scottish-ministerial-code-2018-edition/>

Ministerial Code. James Hamilton, one of the advisers, was appointed to carry out an investigation in order to answer that question. In doing so, he was assisted by a number of Scottish Government civil servants appointed to a secretariat for the specific purposes of the investigation.

2. On 22 March 2021, Mr Hamilton's [report](#)<sup>2</sup> was published in a redacted form. Mr Hamilton found no breach of the Ministerial Code by the First Minister.
3. On 5 April 2021, the Applicant made a request for information to the Authority. He asked for all written evidence to Mr Hamilton's investigation into the First Minister. This was to include evidence from the First Minister, her Chief of Staff and any other individuals within the Scottish Government who had submitted evidence.
4. A response was provided to the Applicant on 13 May 2021. The Authority:
  - (i) told the Applicant that Mr Hamilton, as an independent adviser on the Ministerial Code, was not subject to FOISA. Therefore, information held by or on behalf of Mr Hamilton was not within scope of FOISA.
  - (ii) applied the exemption in section 25(1) of FOISA (Information otherwise accessible) for information that was published on its and the Scottish Parliament's website; and
  - (iii) applied the exemption in section 30(c) of FOISA (Prejudice to effective conduct of public affairs) to the written submissions held by the Ministers on the basis that disclosure of the submissions, particularly so soon after the publication of the report, would be likely to undermine the credibility and authority of the final report.
5. Later that day, the Applicant wrote to the Authority requesting a review of its decision. While the Applicant appeared to accept that some of the information would be exempt from disclosure, he disagreed that the exemption in section 30(c) would apply to all of the information.
6. The Authority notified the Applicant of the outcome of its review on 9 June 2021. It upheld its original decision, with one modification. The Authority explained that some of the evidence presented by the Permanent Secretary was included within Mr Hamilton's report. This information was withheld under section 25(1) of FOISA and a link was provided to the Applicant to enable him to access the evidence in question. The Authority also sought to address the other areas of dissatisfaction raised by the Applicant in his requirement for review.
7. On 10 June 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA.

## Investigation

8. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
9. On 17 June 2021, the Authority was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.

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<sup>2</sup> [Independent report by James Hamilton on the First Minister's self-referral under the Scottish Ministerial Code - gov.scot \(www.gov.scot\)](#)

10. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions.

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

11. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.
12. 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 an authority to withhold information or charge a fee for it.
13. The information to be given is that held by the authority at the time the request is received, (section 1(4)). Section 3(2) of FOISA defines the circumstances in which information is considered to be held by a Scottish public authority (see Appendix 1). There is no suggestion that section 3(2)(a)(ii) applies so, for the purposes of this decision, information will be held by the Authority if it is held:
  - by the Authority otherwise than on behalf of Mr Hamilton (section 3(2)(a)(i)) or
  - by Mr Hamilton on behalf of the Authority (section 3(2)(b)).

### ***Submissions from the Authority***

14. The Authority's position was that Mr Hamilton, as one of the independent advisers on the Ministerial Code, is not subject to FOISA. It considered that, given their independent role, the advisers cannot be said to be covered by the Scottish Ministers' designation under paragraph 1 of Schedule 1 to FOISA. The Authority therefore concluded that information held by, or on behalf of, Mr Hamilton was not held by it for the purposes of FOISA.
15. The Authority submitted that, while Mr Hamilton was carrying out his investigation and preparing his report, he was assisted by a secretariat, staffed by Scottish Government civil servants. In carrying out their secretariat functions, those civil servants understood that they owed their duties to Mr Hamilton as the independent adviser, rather than to the Authority. Information was held by the secretariat in such a way that it was not accessible to other Scottish Government civil servants.
16. In undertaking searches, the Authority stated that it considered whether it held any information falling within scope of the request, leaving out of account any information that happened to be on the Authority's systems, but accessible only to the secretariat, on the basis that such information was held on behalf of Mr Hamilton.
17. The Authority provided a copy of the appointment letter issued to Mr Hamilton, and commented that the appointment was an on-going arrangement whereby matters could be referred to Mr Hamilton on a case by case basis at the discretion of the First Minister for the purposes of providing independent advice in relation to the Ministerial Code.
18. The Authority also provided the Commissioner with information setting out the remit and terms under which the secretariat set up to assist Mr Hamilton with his investigation would act. It explained to the Commissioner how information relating to the investigation was held and stored, and why this meant that the information was only accessible to a limited number of staff working in the secretariat supporting Mr Hamilton.

19. The Authority advised the Commissioner that Mr Hamilton remains the decision maker for the retention of records for the investigation.
20. The Authority therefore concluded that, although the files relating to the investigation are technically stored in its IT system, it does not hold the files for the purposes of FOISA. Rather, the files are held on behalf of Mr Hamilton acting in his capacity as an independent adviser.

### ***The Commissioner's view***

21. The critical question for the Commissioner to consider is not whether Mr Hamilton, as an independent adviser, is to be regarded as a separate entity, but whether the information which Mr Hamilton holds is, for the purposes of section 3(2) of FOISA, held by the Authority.
22. In considering whether an authority holds information, the Commissioner will consider a number of factors, including (but not limited to):
  - whether there is an appropriate connection with the authority, meaning that the information is for the purposes of carrying out its functions as a public authority (as described by the Upper Tribunal (England and Wales) in its [decision](#)<sup>3</sup> *University of Newcastle v Information Commissioner [2011] UKUT 185 (AAC)* and expressly approved by the Court of Session in *Graham v Scottish Information Commissioner [2019] CSIH 57*<sup>4</sup>)
  - the content of the information
  - the circumstances in which it was created and
  - how it is held.
23. The Commissioner notes that the referral was instructed by the First Minister. In accordance with paragraph 1.7 of the Ministerial Code, the purpose of such a referral is to provide the First Minister with advice on which to base her judgement about “any action required in respect of Ministerial conduct.” The referral in question was instructed for the purpose of investigating and advising as to whether the First Minister had breached paragraphs 4.22 and 4.23 of the Ministerial Code.
24. In this case, the remit provided that the report of the investigation should be submitted to the Deputy First Minister. The investigation was subject to “ministerial oversight” albeit it was made clear that secretariat staff should not disclose the information outwith the secretariat itself. (This point is addressed below.) A redacted version of the final report was published on the Authority’s website.
25. Compliance with the Ministerial Code is a matter in which the Scottish Ministers collectively have an interest. The Code itself emphasises the duties incumbent on ministers and their collective responsibility. It is binding on ministers.
26. The referral with its associated investigation was instructed and carried out, evidence was obtained, and the report produced, for the purpose of considering whether the First Minister’s conduct complied with the Code and advising on appropriate sanctions if it did. Information was obtained and created for that purpose. In the Commissioner’s view, this amounts to an

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<sup>3</sup> <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=3263>

<sup>4</sup> <2019csih57.pdf> ([scotcourts.gov.uk](http://scotcourts.gov.uk))

appropriate connection with the Authority such that information is held by it for the purposes of section 3(2) of FOISA.

27. As noted above, although the investigation was subject to ministerial oversight, it was made clear that secretariat staff should not disclose the information outwith the secretariat itself. However, this does not affect the Commissioner's view that the information is held by the Authority. Here, the staff of the secretariat work for the Authority. Any restrictions on information security or disclosure imposed on them have been imposed by more senior officials of the Authority. The restrictions could, if so desired, be lifted by the same or other senior officials. In other words, there is nothing in the restrictions under which the secretariat staff worked which binds the Authority: it chose to impose them and could choose to lift them. While there may be circumstances which constitute a relevant restriction on access to information which have the effect that information is not held by the Authority, the Commissioner does not consider that to be the case here.
28. For essentially the same reasons, the Commissioner does not consider that what is described as an agreement reached with the secretariat that investigation materials should be held by Mr Hamilton rather than by the Authority does not affect the answer as to whether, on a proper construction of section 3(2), the Authority "holds" that information.
29. In addition, as mentioned above, at the conclusion of the investigation, a final report setting out Mr Hamilton's findings was made available to the Deputy First Minister. It is evident from the [Note](#)<sup>5</sup> which Mr Hamilton asked to be published alongside the redacted report that the decision over what information should be redacted from the report prior to its publication lay not with him, or with his secretariat, but with the Authority (for example, the Note clearly states, "I have had no responsibility for deciding what to redact").

## Conclusions

30. Having considered all the relevant submissions provided in this case, the Commissioner cannot accept that information gathered by Mr Hamilton, and/or his secretariat, for the purposes of his investigation is not "held" by the Authority in terms of section 3(2) of FOISA.
31. This does not mean, however, that the information will be disclosed. As noted above, the right to information in section 1(1) is not absolute.
32. The Authority relied on the exemption in section 30(c) to withhold the information which it accepts it holds. However, given the Commissioner's findings, it is clear that the Authority holds more information than the Commissioner was given access to during the investigation.
33. The exemption in section 30(c) of FOISA is subject to the public interest test in section 2(1)(b), which means that, even if the Commissioner finds that the exemption is engaged, he must go on to consider whether the public interest in disclosure outweighs the public interest in maintaining the exemption.
34. It is entirely possible that the contents of the information which the Authority has argued it does not hold (but which the Commissioner has found that it does hold) could affect the balance of the public interest test in relation to the information which the Authority accepts it does hold. As a result, the Commissioner cannot reach a view on whether the Authority was entitled to rely on section 30(c) until he is satisfied that the Authority has identified all of the information covered by the Applicant's request that it holds.

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<sup>5</sup> [Note on the publication of a redacted report -- James Hamilton.pdf \(www.gov.scot\)](#)

35. This being so, the Commissioner is unable to reach a view on the Authority's application of the exemption to information it has identified and withheld from the Applicant.

## **Decision**

The Commissioner finds that the Authority failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

In notifying the Applicant that it did not hold information for the purposes of section 3(2) of FOISA, the Authority failed to comply with section 1(4) of FOISA.

The Commissioner therefore requires the Authority to carry out a further review and respond to the Applicant afresh, by **17 March 2023**.

## **Appeal**

Should either the Applicant or the Authority 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.

## **Enforcement**

If the Authority fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Authority has failed to comply. The Court has the right to inquire into the matter and may deal with the Authority as if it had committed a contempt of court.

**Daren Fitzhenry**  
**Scottish Information Commissioner**  
**31 January 2023**

## 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.
- (2) The person who makes such a request is in this Part and in Parts 2 and 7 referred to as the “applicant.”
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

#### 3 Scottish public authorities

- ...
- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-
  - (a) by the authority otherwise than-
    - (i) on behalf of another person; or
    - (ii) in confidence, having been supplied by a Minister of the Crown or by a department of the Government of the United Kingdom; or
  - (b) by a person other than the authority, on behalf of the authority.
- ...

#### 47 Application for decision by Commissioner

- (1) A person who is dissatisfied with -
  - (a) a notice under section 21(5) or (9); or
  - (b) the failure of a Scottish public authority to which a requirement for review was made to give such a notice.

may make application to the Commissioner for a decision whether, in any respect specified in that application, the request for information to which the requirement relates has been dealt with in accordance with Part 1 of this Act.
- (2) An application under subsection (1) must -
  - (a) be in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);
  - (b) state the name of the applicant and an address for correspondence; and
  - (c) specify –
    - (i) the request for information to which the requirement for review relates;
    - (ii) the matter which was specified under sub-paragraph (ii) of section 20(3)(c); and

- (iii) the matter which gives rise to the dissatisfaction mentioned in subsection (1).