



Scottish Information
Commissioner

Decision 154/2006 Mr T and Highland Council
<i>Request for papers relating to appeal at the District Court</i>

Applicant: Mr T
Authority: Highland Council
Case No: 200600651
Decision Date: 16 August 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews
Fife
KY16 9DS



Decision 154/2006 Mr T and Highland Council

Request for papers relating to appeal at District Court – whether information held by Council – section 37(1) Court records applied – application of section 37(1)(a) upheld

Facts

Mr T wrote to Highland Council (the Council) seeking access to papers relating to an appeal to the Highland District Court. The Council declined to provide the papers requested. Despite several reminders and reference to the Freedom of Information (Scotland) Act 2002 (FOISA), the Council still declined to supply the information requested. Mr T applied to my Office for a decision.

Outcome

The Commissioner found that the information requested was held by the Council.

The Commissioner found the Council had complied with Part 1 of FOISA in refusing to provide the information to Mr T on the basis that the information was exempt by virtue of section 37(1)(a).

The Commissioner found that the Council had failed to comply with Part 1 of FOISA by failing to issue a refusal notice in accordance with the terms of section 16(1) and failing to advise the applicant of his various rights of review and appeal

Appeal

Should either the Council or Mr T wish to appeal against this decision, there is a right to appeal to the Court of Session on a point of law only. Any such appeal must be made within 42 days of receipt of this notice.



Background

1. On 31 October 2005, Mr T contacted the Depute Clerk of the District Court based at the Council and asked for the following information in respect of a named appeal:
 - Copy of all current and relevant papers regarding this appeal. In addition a copy of the transcript/notes taken during the trial would be most helpful
2. In his response of 2 November 2005, the Depute Clerk did not respond to the request for information, but rather referred Mr T to the fact that the court action in question was now considered abandoned and the Court could not enter into any further correspondence with him.
3. Mr T subsequently wrote on 19 January 2006 seeking access to the information again. The Depute Clerk responded on 8 February 2006 advising that the information would not be released to Mr T.
4. On 24 February 2006, Mr T again requested the information specifying the exact items he was seeking. In this letter he indicated that this was a request under FOISA.
5. On 28 February 2006 the Depute Clerk responded indicating that the documents sought would not be released. The Depute Clerk advised that in his view Mr T was not entitled to receipt of these documents under FOISA or under any other legislation.
6. Mr T was dissatisfied with this response and on 21 March 2006 applied to my Office for a decision.
7. The case was allocated to an investigating officer.

Investigation

8. Mr T's appeal was validated by establishing that he had made a request to a Scottish public authority, and had appealed to me only after asking the authority to review its response to his request.



9. Although Mr T did not formally request a review both his letters of 19 January 2006 and 24 February 2006 reminded the Council of this request for information. In the circumstances, given that Mr T was never advised by the Council of his right to seek a review, I consider that this correspondence amounted to a request for review in terms of section 20(3) by Mr T in that he expressed dissatisfaction that the information had not been supplied to him.
10. On 26 April 2006, the investigating officer contacted the Council advising it that an application from Mr T had been received and inviting its comments on the matters raised by the application in terms of section 49(3)(a) of FOISA. The investigating officer sought certain information from the Council to assist with the investigation.
11. There followed a series of correspondence between the investigating officer and the Freedom of Information contact at the Council and between the investigating officer and the Clerk of the District Court.
12. In the course of this correspondence, the Council made a number of submissions in respect of this application.
13. The Council submitted that the information requested by Mr T was held by the Highland District Court rather than by the Council. The Council advised that District Courts are constituted under the District Courts (Scotland) Act 1975 and that although councils have responsibility for staffing and for accommodation of both bodies and will hold information about their administration, the Courts are separate statutory bodies.
14. The Council advised that, as a result of the above, it was unable to provide the information requested for the purposes of the investigation. Rather, this information was supplied to my Office by the Clerk of the District Court.
15. The Council submitted that Mr T had written to the Depute Clerk. As a result, there was no need for the Depute Clerk to follow Highland Council procedures in respect of FOI requests as the letter was received by the District Court and not the Council.
16. Further submissions on the distinction between the District Court and the Council were made by the Clerk of the District Court. The Clerk also argued that even if the information was held by the Council the information would be exempt by virtue of section 37 of FOISA in that the information held amounted to a Court record.
17. The Clerk of the Court set out the information held relevant to Mr T's request, described its content and the context in which this information was created or lodged. The Clerk supplied copies of this information to my Office (with the exception of any handwritten notes made by the Clerk or the Justices of the Peace).



18. I will address the Council's submissions in my analysis and findings below.

Commissioner's analysis and findings

19. Mr T requested a copy of all current and relevant papers relating to a specified appeal. In addition, he sought a copy of the transcript/notes taken during the trial. The Council has made a number of submissions in respect of this investigation which I will address below. I have also considered comments received from the District Courts Association.

Was the information requested from a Scottish public authority?

20. FOISA applies only to Scottish public authorities as defined in section 3 of this legislation. Therefore, a request made to a body falling outwith this definition will not be a request under FOISA.
21. The Council has submitted that Mr T's request for information was made to the District Court rather than to the Council. The Council has submitted that the Court is a separate legal entity not covered by FOISA. Therefore I am required to consider whether a request to the Depute Clerk or Clerk of the District Court amounts to a request for information to the Council.
22. While I accept that the District Court is a separate legal entity from the local authority the separation between the two bodies is not entirely complete. Each local authority has an obligation to provide suitable and sufficient premises and facilities for the purposes of the District Court for its area, a Clerk of the District Court and staff for its administration.
23. The Clerk and Depute Clerk of the District Court are by definition employees of the Council. It is worth noting that the request from Mr T was made to the Depute Clerk at Council premises. Indeed, some of the responses issued to Mr T were sent on Council headed paper rather than District Court headed paper. It is further noted that certain correspondence with the applicant was from the Council Area Solicitor: this appears in fact to be the same person as the Depute Clerk, and both titles appear to have been used interchangeably.



24. I accept that the Clerk to the Court will have certain duties to the Court in addition to duties directly owed to his/her employer. The Clerk is a lawyer, however, and it is not unusual for lawyers or, for that matter, other professionals to have professional responsibilities in addition to the responsibilities of an employee. Such responsibilities do not diminish their employment status. Both the Clerk and the Depute Clerk of the District Court are employed by the Council to do that job (perhaps along with other functions) and are accountable to their employer for the performance of that employment in much the same way as any other employee, whatever duties may be owed elsewhere. Similarly, a Sheriff Clerk, Clerk of Session or Judiciary Clerk will owe duties to the Court he or she services, but will remain a Civil Servant within the Scottish Court Service subject to Civil Service codes of conduct.
25. Therefore, I am satisfied that although the Clerk and Depute Clerk have duties to the Court, they are ultimately employees of the Council and accountable in terms of their performance to the Council. In the circumstances, I am satisfied that the request to the Clerk or Depute Clerk to the District Court was a request to a public authority (i.e. Highland Council) and therefore should have been treated as a request under the FOISA.

Is the information requested “held” by the Council?

26. However, even if I am satisfied that the request for information was made to a Scottish public authority for the purposes of FOISA, I must go on to consider whether the information is actually “held” by the Council. Under section 3(2)(a)(i), information is not held by an authority for the purposes of FOISA if it is held by the authority on behalf of another person. Therefore, I need to consider whether the information requested by Mr T was held by the Council on behalf of the District Court.
27. On the one hand, it is difficult to see how information could be held by the Court unless it is physically in the possession of the Justices. This supports the view that information held by the Clerk or Depute Clerk is therefore only held by these staff on behalf of the Court. However, it could also be argued that the information is held by the Council in its own right by virtue of being held by Council employees carrying out their duties as Council employees.
28. In considering this issue, I have taken note of section 20(5) of the District Courts (Scotland) Act 1975 which provides that all records relating to the acts of Justices for the area are the records of the local authority concerned.



29. I have also taken into account the analogous situation in respect of the Scottish Court Service (SCS). The SCS provides administrative support to the courts and, as a result, holds court documentation and related correspondence and supplies the employees who administer the Sheriff Courts, Court of Session and High Court of Justiciary in their daily activities. The SCS is clearly a Scottish public authority for the purposes of FOISA, as part of the Scottish Executive, and court information held by it will be held for the purposes of FOISA. It would appear contradictory were the equivalent information in respect of the District Courts and the activities of its administrators not covered by FOISA.
30. In all the circumstances, I am satisfied that the information requested by Mr T in this case was held by the Council for the purposes of FOISA.

Is the information exempt under section 37(1) of FOISA?

31. In its submissions to my Office, the Council submitted that Mr T was likely to possess already some of the information requested. The Council went on to state that even if the request did fall within the scope of FOISA it considered the information to be exempt by virtue of section 37 in that the information requested amounted to court records. I will therefore go on to consider the application of this exemption to the information requested.
32. Mr T requested a copy of all current and relevant papers regarding a specified appeal. In addition, he sought a copy of the transcript/notes taken during the trial.
33. The Council has supplied me with almost all information it holds relevant to Mr T's request. For the sake of clarity, the information requested is limited to information held at the time of Mr T's original request of 31 October 2005. A number of documents supplied post-date October 2005 and therefore fall outwith the scope of this application.
34. The Council has set out detailed submissions in respect of the information held and why it falls within the scope of section 37(1). Although I do not intend to repeat the submissions in this decision I have taken into account all of its arguments in considering the application of this exemption.
35. Section 37(1)(a) states that information is exempt information if is contained in a document:
- (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or member of its administrative staff for the purposes of, or in the course of, such proceedings.



36. In essence, section 37(1) provides for an absolute exemption in respect of all information lodged, or otherwise placed in the custody of the court or created by a court (or its staff) for the purposes of court proceedings.
37. The term “lodged” refers to the formal depositing of documents with a court. Likewise, the term “serve” refers to the official delivery of documents relating to a court case (for example, a summons or a writ). During the Justice 1 Committee’s consideration of this exemption, the then Justice Minister (Jim Wallace) suggested that documents not lodged with the court but held by it pending an appeal could fall under the term “otherwise placed in the custody of a court”.
38. I have considered the information supplied to me by the Council (with the exclusion of the information post-dating Mr T’s original request). I am satisfied that all of the information falls within the scope of section 37(1). In most cases the information relates to formal court papers, such as the stated case, which I accept has been created by the court for the purposes of section 37(1)(a)(iii). I am also satisfied that certain correspondence, while not formally lodged with the court, is “otherwise placed in the custody of the court” for the purposes of section 37(1)(a)(i).
39. I accept that for the purposes of section 37(1), a document sent to the Clerk or Depute Clerk of the Court is lodged with the court or otherwise placed in its custody. I do not consider that this interpretation of section 37(1) contradicts my view that a request for information made to the Clerk or Depute Clerk of the Court is a request to the Council. This position simply reflects the fact that the Clerk and Depute Clerk to the Court have dual functions and responsibilities; those to the District Court and those responsibilities they have by virtue of being Council employees.
40. The Council declined to provide me with copies of handwritten notes created by the Clerk or the Justices in the Court. In this case, I did not consider it necessary to issue an Information Notice under section 50 of FOISA in respect of this information as it is clear to me that handwritten notes created in the course of the proceedings will be created by the court and will therefore fall within the scope of section 37(1)(a)(iii).
41. In conclusion, therefore, I am satisfied that the information requested by Mr T is exempt by virtue of section 37(1)(a) of FOISA. Section 37 is an absolute exemption in that it is not subject to the public interest test contained in section 2(1)(b) of FOISA. This means that I am not required to go on to consider whether the public interest in disclosing the information requested is outweighed by the public interest in maintaining the exemption.



Technical breaches of FOISA

42. I will address briefly several technical breaches of FOISA made by the Council in dealing with Mr T's request for information. While the Council responded promptly to Mr T's correspondence, it did not issue a refusal notice in terms of section 16(1). Nor did the Council advise Mr T of his rights of application to the authority or to me conferred by section 20(1) and 47(1) (or his right of appeal against my decision conferred by section 56), as required by sections 19(b) and 21(10).
43. If the Council considered that it did not hold the information requested by Mr T because, for example, the information was held by it on behalf of the District Court, then a notice under section 17(1) of FOISA should have been issued.

Decision

I find that Highland Council (the Council) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in that the information requested by Mr T is exempt by virtue of section 37(1)(a) of FOISA.

I find that the Council failed to comply with Part 1 of the FOISA in failing to issue a notice in conformity with section 16(1) and a notice in conformity of section 21(5) and in failing to inform Mr T of his rights under sections 20(1), 47(1) and 56, as required by section 19(b) and 21(10) of FOISA.

I do not require the Council to take any remedial action in respect of these breaches.

Kevin Dunion
Scottish Information Commissioner
16 August 2006