



Decision Notice 171/2024

Name of staff member who requested Police Scotland to monitor peaceful protest

Authority: Scottish Courts and Tribunals Service
Case Ref: 202400209

Summary

The Applicant asked the Authority for information of the name of the individual at a specified Sheriff Court who ordered or asked Police Scotland officers to shadow him when he was “peacefully protesting”. The Authority informed the Applicant it did not hold the information. The Commissioner investigated and was satisfied that the Authority did not hold the information requested.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2), (4) and (6) (General entitlement); 17(1) (Notice that information is not held); 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 5 October 2023, the Applicant made a request for information to the Authority. The Applicant asked for the name of the individual in a specified Sheriff Court who ordered or asked for Police Scotland officers to shadow him when he was peacefully protesting.
2. The Authority responded on 13 October 2023 with a notice, under section 17(1) of FOISA, that it did not hold the information requested. The Authority explained that “no instruction” was made to Police Scotland by the Sheriff or by any Authority employee.

3. On the same day, the Applicant wrote to the Authority requesting a review of its decision. The Applicant explained that he had been told by a member of staff from “the civil office” that the order came “from above”, which indicated it came from a Sheriff. The Applicant also stated he had been informed by two Police Scotland officers that they had “received instruction” from the Court.
4. The Authority notified the Applicant of the outcome of its review on 9 November 2023, fully upholding its original response. The Authority explained that it understood the Applicant had directly corresponded with the specified Sheriff Court in which reference was made to a verbal conversation between the Applicant and a staff member regarding the information requested. However, the Authority confirmed it had established that the staff member had not stated that a Sheriff or employee of the Authority had given the instruction to shadow the Applicant but had merely assumed that it “could have been”.
5. The Authority apologised for any confusion caused by that discussion but confirmed that “no instruction” was given to Police Scotland by a Sheriff or any employee of the Authority and that it held no recorded information relevant to the request.
6. On 18 December 2023, the Applicant provided the Authority with a letter dated 28 November 2023 that he had received from Police Scotland which he said showed they had been asked by “the civil office” to “shadow” him.
7. On 18 January 2024, the Authority responded to the Applicant regarding the letter he had provided from Police Scotland. The Authority explained that it had carried out further investigations with the Court in question and again confirmed that it held no recorded information relevant to the Applicant’s request.
8. On 9 February 2024, 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 Authority’s review because he considered that it did hold information relevant to his request.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 8 March 2024, the Authority was notified in writing that the Applicant had made a valid application. The case was subsequently allocated to an investigating officer.
11. 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

12. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 17(1) – Notice that information is not held

13. 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.
14. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA. 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 that effect.
15. 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 must first consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority.
16. The Commissioner also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, the Commissioner's role is to determine what relevant recorded information is held by the public authority (or was, at the time it received the request).

The Applicant's submissions

17. The Applicant stated that he had been peacefully protesting in the same location at the specified Sheriff Court for several years without issue.
18. As rehearsed earlier, the Applicant explained that he had been told by a member of staff from "the civil office" that the order came "from above", which indicated it came from a Sheriff. The Applicant also stated he had been informed by two Police Scotland officers that they had "received instruction" from the Court.
19. The Applicant stated that he therefore believed the Authority did hold information relevant to his request and that it was refusing to disclose that information to him.

The Authority's submissions

20. The Authority noted that it considered that the Applicant had "intentionally and consciously" used the word "shadow" in his request to specify what information he required. However, the Authority explained that it had not been "overly semantic" in its interpretation of the request and confirmed that if it had held any recorded information concerning a request made to Police Scotland on the relevant date relating to the Applicant it would have considered that information with a presumption toward disclosure.
21. The Authority explained that the Sheriff Clerk at the specified Sheriff Court is the most senior member of staff, and they would have overall awareness and responsibility for staff and the building premises. Given the subject matter of the request, the Authority stated that this would fall within the remit of the Sheriff Clerk, and they were therefore deemed the appropriate point of contact to consider and advise on the request.
22. The Authority stated that discussions with Police Scotland had been limited between the Sheriff Clerk at the specified Sheriff Court and a police sergeant and they had all been verbal (via telephone call or in person). The Authority confirmed that it therefore held no recorded information relevant to the request.

23. The Authority also explained that no verbal request to “shadow” the Applicant was ever made. The Authority noted that it considered this was consistent with a letter from Police Scotland to the Applicant (dated 28 November 2023) which included the account of a police officer who stated he had not attended the specified Sheriff Court to shadow the Applicant.
24. During the investigation, the Authority provided the Commissioner with emails detailing the enquiries and searches it had undertaken in response to the request. The Authority confirmed that these enquiries and searches returned no recorded information held at the time of the request.
25. However, the Authority provided the Commissioner with an internal email (dated 23 May 2024) between the officer handling the application on behalf of the Authority and the Sheriff Clerk. The email comprised the agreed text of the Authority’s position on the events of the date in question. In summary:
 - the Applicant was peacefully protesting at the back of the Court
 - employees of the Authority raised concerns verbally with the Sheriff Clerk due to the location of the Applicant, as he was near the back door they were using to enter the building
 - the Sheriff Clerk had a verbal discussion with the Sheriff Principal to advise that they were going to contact Police Scotland to ask if one of the court-stationed police officers could be positioned at the back door of the Court to provide staff with reassurance
 - the Sheriff Clerk contacted the court-stationed police by telephone and spoke with the Police Sergeant, who discussed the matter further with the Sheriff Clerk in person
 - during that discussion, the Sheriff Clerk requested that one of the court-stationed police officers be posted at the back door of the Court to alleviate staff concerns
 - this request was verbally agreed to and a court-stationed police officer took up post at the back door
 - the request was solely for a police presence at the back door of the Court; there was no request for the police to shadow the Applicant or to otherwise infringe on his rights in terms of his protest
 - all discussions with Police Scotland were limited to the Sheriff Clerk and the Police Sergeant and were all verbal (via telephone or in person)
 - the Authority therefore holds no recorded information relevant to the Applicant’s request.
26. The Authority prepared a redacted version of the agreed text in the above internal email for disclosure to the Applicant to aid his understanding of the events of the dates in question. With the consent of the Authority, the Commissioner shared this redacted version with the Applicant on 11 June 2024.
27. The Authority confirmed that it wished to maintain its reliance on section 17 of FOISA.

The Commissioner’s view

28. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, FOISA does not require a public authority to create recorded information to respond to a request, or to provide information which is not held in recorded form. The

information to be given is that held by the authority at the time the request is received, as defined in section 1(4) of FOISA.

29. Given the explanations and submissions provided, the Commissioner accepts that the Authority took adequate and proportionate steps in the circumstances to establish if the information was held and he is satisfied, on balance, that it did not, on receipt of the request, hold the information requested by the Applicant.
30. As rehearsed earlier, the Authority provided some information to the Applicant during the Commissioner's investigation. The Commissioner accepts that this information was generated by the Authority during his investigation and was not, in terms of section 1(4) of FOISA, recorded information held by the Authority at the time it received the Applicant's request.
31. While the Applicant believed and expected the specified information to be held by the Authority, the Commissioner is satisfied that this was not the case. Whether a public authority should hold information which it does not hold is not a matter for the Commissioner to decide.
32. The Commissioner therefore concludes that the Authority was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that it did not hold the information requested.

Decision

The Commissioner finds that the Authority 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 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.

David Hamilton

Scottish Information Commissioner

27 August 2024

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.”
- ...
- (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 information may be made before the information is given.
- ...
- (6) This section is subject to sections 2, 9, 12 and 14.

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.
- ...

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).