

Decision Notice

Decision 012/2015: Mr A and the Scottish Court Service

Report to Parole Board

Reference No: 201402371

Decision Date: 26 January 2015



Scottish Information
Commissioner

Summary

On 15 September 2014, Mr A asked the Scottish Court Service (the SCS) for a copy of a report to the Parole Board for Scotland (the PBS), together with other information about this type of report.

The SCS informed Mr A that reports of this nature are only provided to the Scottish Prison Service (the SPS) and he was not entitled to receive a copy. Following a review, Mr A remained dissatisfied that he had not been provided with all the information he requested, or with statutory information advising of his rights of review and appeal.

The Commissioner investigated and found that the SCS had generally dealt with Mr A's request for information in accordance with Part 1 of FOISA in withholding the report. The Commissioner also found that the SCS failed to notify Mr A that it did not hold some of the information falling within part (ii) of his request.

The Commissioner also identified failures in the content of the initial refusal notice and the review outcome issued by the SCS, but did not require the SCS to take any action.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a), (2)(d) and (2)(e)(i) (Effect of Exemptions); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that Information is not held); 19 (Content of certain notices); 21(10) (Review by Scottish public authority); 37(1)(a) (Court records, etc.); 38(1)(a) (Personal information).

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data")

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 15 September 2014, Mr A made a request for information to the SCS. He requested:
 - (i) a copy of a report by the sentencing judge to the PBS;
 - (ii) all and any information setting out the basis upon which such reports should be produced and communicated to sentenced prisoners; and
 - (iii) the date upon which any such report was produced in his case, and whether any steps were taken to communicate it to him (should such a report have been written).
2. The SCS responded on 16 September 2014, explaining that it was unable to provide Mr A with a copy of the report as it was only permitted to provide it "to the Parole Board at the Scottish Prison Service". The SCS suggested Mr A might wish to contact the SPS in this regard.

3. On 19 September 2014, Mr A wrote to the SCS, requesting a review of its decision on the basis that the SCS had not provided him with the information requested or cited an exemption in accordance with FOISA. He also expressed dissatisfaction that he had not been provided with information on his right to request a review.
4. The SCS notified Mr A of the outcome of its review on 30 September 2014. It provided Mr A with the dates on which the report had been signed by the sentencing judge and sent to the SPS "for the exclusive use of the Parole Board". The SCS confirmed that it was only permitted to provide the report to the SPS and that Mr A was not entitled to receive a copy. It appeared to apply section 37 of FOISA.
5. On 6 October 2014, Mr A applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr A stated he was dissatisfied with the outcome of the SCS's review because:
 - (i) he believed the SCS had failed to conduct a proper search to establish what information it held which fell within the scope of his request;
 - (ii) he disagreed with the SCS's application of section 37 of FOISA, and
 - (iii) the SCS had failed to provide him with statutory information on his rights of review and appeal.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that Mr A made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
7. The case was allocated to an investigating officer. On 6 November 2014, the SCS was notified in writing that Mr A had made a valid application.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SCS was invited to comment on this application and answer specific questions.
9. In relation to the information in the report, the SCS was asked to state which exemption(s) in FOISA it considered applicable, and to justify its reliance upon any such exemption in withholding the report.
10. In relation to information pertaining to the process and procedures for producing and communicating such reports, the SCS was asked to confirm whether or not any information was held. It was also asked to explain, and to provide evidence of, the searches carried out to identify and locate any information falling within the scope of this part of Mr A's request.
11. The SCS was also invited to comment on whether it had complied with the procedural requirements of Part 1 of FOISA in responding to Mr A.

Commissioner's analysis and findings

12. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr A and the SCS. She is satisfied that no matter of relevance has been overlooked.

Part (i) of Mr A's request - information held by the SCS

13. In his application to the Commissioner, Mr A maintained that the SCS held information falling within the scope of his request, namely the report to the PBS. Neither the SCS's initial response nor the review outcome suggests otherwise.
14. Section 1(1) of FOISA creates a general right of access to recorded information held by a Scottish public authority, except where that right is disapplied by the application of one of the exemptions in Part 2 of FOISA, or another provision in Part 1 of FOISA.
15. Section 3(2)(a)(i) of FOISA makes it clear that if a Scottish public authority holds the information on behalf of another person, then the information is not held by that authority for the purposes of FOISA.
16. In its submissions to the Commissioner, the SCS submitted that its involvement in the processing of the type of report sought by Mr A was restricted to its transmission, on behalf of the relevant judge, to the Scottish Government's Parole Unit (and also to the Scottish Prison Service in life imprisonment cases). The SCS considered its role to be essentially "that of a delivery agent for the sentencing judge".
17. The SCS referred to the Commissioner's guidance on section 37 which states:

Courts, their staff and judges, are not public authorities for the purposes of FOISA and so are not required to make information available in response to FOISA requests. (While the Scottish Court Service is covered by FOISA, it is responsible for only the administration – through support in the form of staff, buildings and technology – of the Scottish Courts.)
18. The SCS contended that the report was held by, or on behalf of, the relevant judge, not by the SCS in its administrative capacity.
19. The Commissioner's *Decision 207/2011 Mr G and the Scottish Court Service*¹ distinguishes between the administrative functions of the SCS under the Judiciary and Courts (Scotland) Act 2008 (which are subject to the requirements of Part 1 of FOISA) and functions properly considered those of the judiciary (which are not). Under section 61(1) of the 2008 Act, the former include "providing, or ensuring the provision of, the property, services, officers and other staff required for the purposes of (a) the Scottish courts, and (b) the judiciary of those courts".
20. The Commissioner accepts that the creation of the report by the sentencing judge is a judicial function, rather than a function of the SCS under section 61 of the 2008 Act. On the other hand, it appears to the Commissioner that in holding the report the SCS was providing a service required for the purposes of the judiciary. This fell within its functions under section 61(1), so it held the information for the purposes of FOISA.
21. The Commissioner must now go on to consider whether or not the SCS was correct to withhold the information in the report from Mr A.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2011/201100892.aspx>

Section 37 of FOISA (Court records, etc.)

22. Section 37(1)(a) of FOISA states that information is exempt information if it 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.
23. Section 37(1) also provides that the exemption will only be engaged if the authority holds the information solely because it is contained in such a document.
24. In his application to the Commissioner, Mr A argued that the withheld information was not in the nature of "court records".
25. In its submissions to the Commissioner, the SCS submitted that the report in question was a court record within the meaning of section 37 of FOISA, as it was:
 - (i) created by the relevant judge, in the course of criminal proceedings (section 37(1)(a)(iii));
 - (ii) then placed in the custody of the PBS (which sat as a tribunal, within the definition in section 37(2) of FOISA) for the purposes of the parole hearing (section 37(1)(a)(i)).

The SCS submitted that the sole reason for the creation and transmission of the report was to inform the PBS's decision-making. It provided further comments in relation to the report and the timing of the relevant process.

26. In essence, section 37(1)(a)(iii) provides an absolute exemption in respect of all documents created by a court or member of its administrative staff for the purposes of, or in the course of, court proceedings, where the information is held by the authority solely because it is contained in such a document.
27. In this case, the Commissioner is satisfied that the document under consideration was created by the sentencing judge in Mr A's case, in that capacity. In the Commissioner's view, it follows that it was created for the purposes of, and in the course of, the relevant criminal proceedings. She is also satisfied that the information was (and is) held by the SCS solely because it is contained within such a document. In the circumstances, she does not find it necessary to consider the relevance of its subsequent use by the PBS.
28. The Commissioner is therefore satisfied that the information requested by Mr A was (and remains) exempt from disclosure by virtue of section 37(1)(a)(iii) of FOISA. This is an absolute exemption which is not subject to the public interest test contained in section 2(1)(b), so the Commissioner is not required to go on to consider the public interest in relation to the information.
29. Having decided that the SCS was correct to withhold the information from Mr A in terms of section 37(1)(a)(iii), the Commissioner is not required to consider the application of any other parts of this exemption claimed by the SCS.

Section 38(1)(a) of FOISA

30. During the investigation, the SCS also relied on section 38(1)(a) of FOISA, as it considered the report contained information which was personal to Mr A, specifically information relating to his conviction for a criminal offence and his sentence for that offence. The information was unique to him and he could be identified from it.
31. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
32. Personal data are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified (a) from those data, or (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix).
33. The Commissioner accepts that the withheld information is about Mr A as an identifiable living individual. Given its nature, in relation to his conviction and sentence, she accepts that it relates to him.
34. The Commissioner is therefore satisfied that the SCS was entitled to withhold the information requested by Mr A (namely the report by the sentencing judge) under section 38(1)(a) of FOISA. As Mr A's personal data, the information will be subject to the subject access rights under section 7 of the DPA: it is not for the Commissioner to comment on whether this information will in fact be accessible to Mr A under that regime, or whether it might be withheld under an exemption in the DPA.

Part (ii) of Mr A's request

35. In his application to the Commissioner, Mr A raised his concern that the SCS had failed to conduct a proper search to establish what information it held which fell within the scope of his request. This does not appear to relate to the report, which the SPS clearly confirmed it held, or to part (iii) of the request (which appears to be addressed fully in the review outcome). In this connection, therefore, the Commissioner will focus on part (ii) of the request.
36. Part (ii) of Mr A's request relates to "information setting out the basis upon which such reports should be produced and communicated to sentenced prisoners". It is evident that this part of the request was not addressed at all in the SCS's responses to Mr A.
37. In its submissions to the Commissioner, the SCS explained that it had no processes or procedures which might fall within the scope of this part of the request. It did not compile the report or send it to the individual concerned. The SCS explained that reports are produced by the relevant judge as part of the court process, its only involvement being in their transmission (to the Scottish Government's Parole Unit, for onward transmission to the PBS, and also to the SPS in life imprisonment cases).
38. The SCS understood that a copy of the report would be provided to the prisoner in advance of their parole hearing, but that would be a matter for those providing administrative support to the PBS (which the SCS did not do).

39. Having considered all the relevant submissions and the explanations provided by the SCS, the Commissioner is satisfied that the SCS does not (and did not, on receipt of Mr A's request) hold information falling within the scope of this part of Mr A's request. Given the SCS's role in the processes relating to the report, she can identify no reason why it would be expected to do so.
40. However, the Commissioner notes that the SCS did not address this part of Mr A's request in responding to Mr A. Given that no such information is (or was) held by the authority, the SCS had a duty to issue a notice in writing to that effect, to comply with the terms of section 17(1) of FOISA.
41. The SCS failed to provide such a notice to Mr A, and therefore the Commissioner finds that it failed to comply with the requirements of section 17(1).

Handling of the Request

42. In his application to the Commissioner, Mr A raised his concern that the SCS had not provided information setting out his rights of review and appeal.
43. Section 19 of FOISA requires that a notice under section 16(1) (refusing information under exemptions) or 17(1) of FOISA must contain particulars –
 - (i) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and
 - (ii) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).
44. Section 21(10) of FOISA requires that a notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.
45. In its submissions to the Commissioner, the SCS acknowledged that Mr A was not informed of his rights under FOISA and, in particular, his right to appeal to the Commissioner. The SCS apologised for this, submitting that it was an isolated occurrence. It agreed to revisit its guidance, and remind staff, regarding the correct handling of information requests.
46. The Commissioner notes that the SCS's initial response of 16 September 2014 was, in essence, a refusal to provide Mr A with the information he had requested. It did not, however, provide him with details of his right to request a review and apply to the Commissioner for a decision. Therefore, the Commissioner has concluded that the SCS failed to comply with section 19 of FOISA in responding to Mr A's request.
47. Although it was more clearly a refusal in terms of FOISA, the SCS's review outcome of 30 September 2014 did not provide Mr A with details of his right to apply to the Commissioner for a decision (or his right of appeal to the Court of Session). Therefore, the Commissioner has concluded that the SCS failed to comply with section 21(10) of FOISA in responding to Mr A's requirement for review.
48. The Commissioner has highlighted the SCS's initial procedural failure here, because no attempt was made to address it on review. The SCS has since acknowledged its failures in this regard, and confirmed that intends to revisit its guidance and refresh staff awareness in this area. In this case, therefore, the Commissioner does not require the SCS take any further action in relation to these failures.

Decision

The Commissioner finds that the Scottish Court Service (the SCS) generally complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr A. In withholding information under exemptions, the SCS complied with Part 1.

The Commissioner also finds that the SCS did not hold any information relating to the process for producing such reports and their communication to the individuals concerned. In not communicating this to Mr A, the SCS failed to comply with section 17(1) of FOISA.

The Commissioner further finds that by failing to notify Mr A of his rights of review and appeal, the SCS failed to comply with sections 19 and 21(10) of FOISA.

The Commissioner does not require the SCS to take any action in respect of these failures.

Appeal

Should either Mr A or the Scottish Court Service 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

26 January 2015

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 –

- (a) the provision does not confer absolute exemption; and

...

- (2) For the purposes of paragraph (a) of subsection 1, the following provisions of Part 2 (and no others) are to be regarded as conferring absolute exemption –

...

- (d) section 37; and

- (e) in subsection (1) of section 38 –

- (i) paragraphs (a), (c) and (d); and

...

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

...

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.

...

19 Content of certain notices

A notice under section 9(1) or 16(1), (4) or (5) (including a refusal notice given by virtue of section 18(1)) or 17(1) must contain particulars-

(a) of the procedure provided by the authority for dealing with complaints about the handling by it of requests for information; and

(b) about the rights of application to the authority and the Commissioner conferred by sections 20(1) and 47(1).

21 Review by Scottish public authority

...

(10) A notice under subsection (5) or (9) must contain particulars about the rights of application to the Commissioner and of appeal conferred by sections 47(1) and 56.

37 Court records, etc.

(1) Information is exempt information if it is contained in-

(a) 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 a member of its administrative staff for the purposes of, or in the course of, such proceedings; or

...

and a Scottish public authority holds the information solely because it is contained in such a document.

(2) In this section-

"court" includes a tribunal or body exercising the judicial power of the State; and

...

38 Personal information

(1) Information is exempt information if it constitutes-

(a) personal data of which the applicant is the data subject;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...

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