

Decision Notice



Decision 046/2012 Mr Tom Taylor and the Standards Commission for Scotland

Information relating to complaint LA/ER/104C

Reference No: 201102102
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Summary

Mr Taylor asked the Standards Commission for Scotland (the SCS) for all of the information it held relating to complaint LA/ER/1046C. The SCS responded by providing some information to Mr Taylor, whilst withholding other information under various exemptions in FOISA. Following a review, the SCS disclosed some additional information, but confirmed that it wished to withhold information in terms of sections 37(1)(b)(i) and 38(1)(b) of FOISA, Mr Taylor remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SCS was entitled to withhold the information under section 37(1)(b)(i) of FOISA.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(d) (Effect of exemptions); 37(1)(b)(i) and (2) (Court records, etc.)

The full text of each of the statutory provisions cited above is reproduced in the Appendix to this decision. The Appendix forms part of this decision.

Background

1. On 21 July 2011, Mr Taylor wrote to the SCS requesting all of the information it held relating to complaint LA/ER/1046C. Mr Taylor noted that he was particularly interested in appendices 'B' and 'C', annexes 'A' and 'B' (which are referred to in the on line report of the complaint) and the results of interviews with two named individuals.
2. The SCS responded on 19 August 2011. The SCS provided Mr Taylor with 19 documents, mostly comprising correspondence in relation to arrangements for the hearing into the complaint, and a recording of the hearing process. It also provided Mr Taylor with a link to its website where other information, such as decision of the hearing was available. The SCS informed Mr Taylor, however, that it was withholding certain information under section 37(1)(b)(i) (Court records, etc.), section 36(2) (Confidentiality) and section 38 (Personal information) of FOISA.



3. Mr Taylor was unhappy with this response and, on 1 September 2011, wrote to the SCS requesting a review of its decision. Mr Taylor raised concerns as to SCS's application of the exemptions in sections 37(1)(b)(i) and 36(2). He questioned whether the information which had been withheld under section 37(1)(b)(i) had in fact been lodged with, or otherwise placed in the custody of, the SCS for the purposes of an inquiry (this point is considered in more detail below) and whether the information remained confidential under section 36(2).
4. The SCS notified Mr Taylor of the outcome of its review on 3 October 2011. During the review, the SCS modified its earlier position. While it remained of the view that much of the information was exempt from disclosure under section 37(1)(b)(i), it provided Mr Taylor with a further two, redacted documents. It also advised Mr Taylor that it had now concluded that the one document which it had withheld under section 36(2) of FOISA was instead exempt under section 37(1)(b)(i).
5. Mr Taylor remained dissatisfied and, on 5 November 2011, wrote to the Commissioner, applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mr Taylor had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to that request.

Investigation

7. On 21 November 2011, the SCS was notified in writing that an application had been received from Mr Taylor and was asked to provide the Commissioner with the information withheld from him. The SCS responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the SCS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions. In particular, the SCS was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. On 11 January 2012, the SCS responded to the effect that it was relying upon sections 37(1)(b)(i) and 38(1)(b) of FOISA to withhold the information withheld from Mr Taylor. The submissions obtained from both the SCS and Mr Taylor, where relevant, are considered in the Commissioner's analysis and findings below.



Commissioner's analysis and findings

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

Section 37 – Court Records

11. Section 37(1)(b)(i) of FOISA states that information is exempt information if it is contained in a document lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration and if a Scottish public authority holds the information solely because it is contained in such a document. This is an absolute exemption in that it is not subject to the public interest test in section 2(1)(b) of FOISA (see section 2(2)(d)).
12. The Ethical Standards in Public Life etc. (Scotland) Act 2000 (the 2000 Act) provides a framework to encourage and, where necessary, enforce high ethical standards in public life. The 2000 Act established the SCS and the post of Chief Investigating Officer (the CIO).
13. The Scottish Parliamentary Commissions and Commissioners etc. Act 2010 (the 2010 Act) provided for a new office, the Public Standards Commission for Scotland (the PSC), which merged the posts of the CIO and the Scottish Parliamentary Standards Commissioner. As a result, since April 2011, the functions previously exercised by the CIO are now exercised by the PSC. (All references to the PSC in this decision include references to the CIO.)
14. Under the 2000 Act, as amended by the 2010 Act, local authorities and devolved public bodies are required to adopt a code of conduct for their members; complaints of potential breaches of these codes may be investigated by the PSC. Should the PSC, in his opinion, determine that a breach of a code has occurred, the matter is referred to the SCS, which may decide to hold a hearing to determine whether a code has been breached.
15. The 2000 Act also governs how an inquiry into the alleged misconduct of a member is conducted. Under section 9(2) of the 2000 Act, it is the duty of the PSC to investigate and report to the SCS on cases in which a member has, may have or is alleged to have contravened a code of conduct. Section 11 further states that the PSC shall provide the SCS with such information concerning the discharge of his functions as the SCS requires.
16. Case LA/ER/1046C related to an investigation conducted by the PCS. Following the completion of the investigation, the information collated by the PCS was referred to the SCS for consideration under section 9(2). The SCS subsequently determined that a hearing should be conducted as provided for by section 16(b) of the 2000 Act.



17. The SCS has submitted that the information it withheld from Mr Taylor under section 37(1)(b)(i) was provided by the PSC solely for the purposes of enabling it to undertake its statutory duty in relation to the provisions of a hearing to determine if a breach of a code of conduct had occurred and to enable a sanction to be applied, if appropriate, at the end of that process.
18. The Commissioner notes that section 37(2) of FOISA states that “inquiry” in section 37(1)(b)(i) means an inquiry or hearing held under a provision contained in, or made under, an enactment.
19. The Commissioner is satisfied that hearings conducted by the SCS under section 16(b) of the 2000 Act are inquiries for the purposes of section 37(2) of FOISA.
20. However, the Commissioner must also be satisfied that the information was contained in a document (or documents) lodged with, or otherwise placed in the custody of, the SCS for the purpose of an inquiry and that the SCS holds the information solely because it is contained in that document or those documents.
21. The submissions made by the SCS on these points are set out above. The Commissioner notes that Mr Taylor disputes that the information was lodged, or otherwise placed in the custody of, the SCS; he gives an example of one document which he considers was a document for the PCS and not for the hearing. Mr Taylor, having listened to an audio recording of the hearing, also comments that no productions were lodged with the hearing and that no documents were read or considered during the hearing.
22. However, all that is required for the exemption in section 37(1)(b)(i) is for the documents to have been lodged, or otherwise placed in the custody of, the SCS for the purposes of the hearing. The Commissioner is satisfied that the documents were all provided to the SCS for the purposes of the hearing (either by the PCS in terms of section 11 of the 2002 Act or by a third party). There is no requirement that the documents are actually used or referred to during the actual hearing or that they are lodged as productions during the hearing. The Commissioner is therefore satisfied that the information contained in the documents, which have been withheld from Mr Taylor, was lodged with the SCS for the purposes of that inquiry.
23. From the explanation given to the Commissioner as to why the SCS had the information, and from the explanation given as to the respective roles of the PCS and the SCS, the Commissioner is also satisfied that the SCS holds the information solely because it is contained in those documents.
24. The Commissioner therefore accepts that the information withheld from Mr Taylor is exempt from disclosure by virtue of section 37(1)(b)(i) of FOISA.
25. Given that the Commissioner has concluded that the information was correctly withheld under section 37(1)(b)(i), she is not required (and does not intend) to consider the exemption in section 38(1)(b) of FOISA as it relates to two of the documents so withheld.



26. In his application to the Commissioner, Mr Taylor said he was unhappy that an address had been redacted from the information provided to him on the basis that it constituted personal data (and was exempt from disclosure under section 38(1)(b) of FOISA). He commented that the address in question is freely available elsewhere and that it was therefore illogical to withhold it. However, at review, Mr Taylor did not express any dissatisfaction with the SCS's decision to redact the address. As a result, this is not a matter which the Commissioner can consider further. For completeness, however, given that the address is available elsewhere and that Mr Taylor is aware of the address, it is highly unlikely that the Commissioner would order the address to be disclosed under FOISA, given that such a disclosure would not be necessary for any legitimate interest that Mr Taylor may have.

DECISION

The Commissioner finds that the Standards Commission for Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Taylor.

Appeal

Should either Mr Taylor or the Standards Commission for Scotland wish to appeal against this decision, there is an 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
Acting Scottish Information Commissioner
13 March 2012



Appendix

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.

...

- (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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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

...

37 Court records, etc.

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

..

- (b) a document-

- (i) lodged with, or otherwise placed in the custody of, a person conducting an inquiry or arbitration, for the purposes of that inquiry or arbitration; or



(ii) created by such a person for such purposes,

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

"inquiry" means an inquiry or hearing held under a provision contained in, or made under, an enactment.

...