

Decision Notice



Decision 065/2011 Mrs Lorraine Scott and the Scottish Court Service

Audio tapes of a Fatal Accident Inquiry

Reference No: 201100078

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Scottish Information Commissioner

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Summary

Mrs Lorraine Scott (Mrs Scott) asked the Scottish Court Service (SCS) to provide her with a copy of audio recordings of the proceedings of a specified Fatal Accident Inquiry (FAI). The SCS responded by notifying Mrs Scott (in terms of section 17 of the Freedom of Information (Scotland) Act 2002 (FOISA)) that it did not hold this information. Following a review, in which the SCS upheld this decision, but also applied the exemption in section 37(1)(a)(iii) (which provides an exemption from disclosure for information contained in documents created by a court or by a member of its administrative staff for the purposes of, or in the course of, court proceedings), Mrs Scott remained dissatisfied and applied to the Commissioner for a decision.

During the investigation, the SCS advised the Commissioner that it no longer considered that it did not hold the information requested by Mrs Scott.

Following an investigation, the Commissioner found that the SCS had partially failed to deal with Mrs Scott's request for information in accordance with Part 1 of FOISA. The Commissioner found that the SCS had been wrong to provide Mrs Scott with a notice under section 17 of FOISA that it did not hold the information when it responded to her request and request for review, as it did hold this information. However, the Commissioner was satisfied that the audio recordings were exempt under section 37(1)(a)(iii) of FOISA, given that they had been created by a member of the court's administrative staff in the course of the FAI.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(a) and (2)(d) (Effect of exemptions); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that information is not held); 37(1)(a)(iii), (2) and (3) (Court records, etc)

Judiciary and Courts (Scotland) Act 2008 sections 61(1) (Administrative support for the Scottish Courts and Judiciary) and 63(1), 2(g) and (h) and (3) (Appointments etc. of office holders)

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.

Decision 010/2011 Mr Keith Knowles and the Scottish Court Service



Background

1. On 10 September 2010, Mrs Scott wrote to the SCS requesting copies of all audio evidence heard at a particular Fatal Accident Inquiry (FAI).
2. The SCS responded on 14 September 2010, notifying Mrs Scott in terms of section 17 of FOISA that it did not hold the information she had requested.
3. The SCS explained that proceedings of FAIs are recorded on tape and a transcript or copy of the tape can only be made if the Sheriff who heard the FAI orders it to be done. The SCS explained to Mrs Scott that the Sheriff was asked to give permission for a transcript or copy of the tape to be made in this case, but he refused to do so.
4. On 22 October 2010, Mrs Scott wrote to the SCS requesting a review of its decision. She indicated that she believed very strongly that it would be in the public interest for the evidence held on the tapes to be thoroughly examined.
5. The SCS notified Mrs Scott of the outcome of its review on 2 December 2010. Its response upheld its previous decision that it did not hold the requested information. The SCS explained that, although the tapes were physically located within premises supplied by the SCS for the purpose of the Sheriff Court in Edinburgh, the extent of judicial control over the recordings meant that they could not be regarded as being held by the SCS.
6. The Commissioner understands from these comments that the SCS considered that, while it physically held the information, it did so on behalf of the court, and as such (given the terms of section 3(2)(a)(i) of FOISA) it did not hold the information for the purposes of FOISA.
7. In addition, the SCS advised Mrs Scott that as the tapes are a court record it was refusing her request in terms of section 37(1)(a)(iii) of FOISA. Section 37(1)(a)(iii) provides an exemption from disclosure for information contained in documents that were created by a court or a member of its administrative staff for the purposes of, or in the course of proceedings.
8. On 11 January 2011, Mrs Scott wrote to the Commissioner, stating that she was dissatisfied with the outcome of the SCS' review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that Mrs Scott 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. The case was then allocated to an investigating officer.



Investigation

10. On 3 February 2011, the SCS was notified in writing that an application had been received from Mrs Scott, and given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The SCS was also asked to respond to specific questions.
11. The investigating officer noted that the recent *Decision 010/2011 Mr Keith Knowles and the Scottish Court Service* (Decision 010/2011) had considered its handling of another request for the audio evidence sought by Mrs Scott, and concluded that it was held by the SCS for the purposes of FOISA. The SCS was asked to confirm whether it still considered that it did not hold the information requested by Mrs Scott.
12. The SCS was also asked provide details of its reasoning when applying the exemption in section 37(1)(a)(iii) of FOISA to the tapes.
13. In its response of 28 February 2011, the SCS confirmed that, in the light of the Commissioner's conclusions in Decision 010/2011, it no longer wished to maintain that it did not hold the information requested by Mrs Scott.
14. The SCS provided an explanation of its reasons for applying the exemption in section 37(1)(a)(iii) of FOISA, along with background information about the rules regulating the manner in which evidence is recorded during a FAI. The SCS's comments drew upon the arguments that were considered in Decision 010/2011, and it referred the Commissioner to the terms of that decision.
15. Submissions were also sought and received from Mrs Scott during the investigation on the matters raised by this case.
16. The submissions received from the SCS and Mrs Scott, in so far as relevant, will be considered in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

17. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mrs Scott and the SCS and is satisfied that no matter of relevance has been overlooked.

Section 37(1)(a)(iii) – Court records, etc.

18. Section 37(1)(a)(iii) of FOISA states that information is exempt information if it is contained in a document created by a court or a member of its administrative staff for the purposes of, or in the course of, proceedings in a cause or matter.



19. Section 37(1) provides that the exemption will only be engaged if the authority holds the information solely because it is contained in a *document*. As indicated in Decision 010/2011, the Commissioner is satisfied (for the reasons given in the Information Tribunal decision *Mitchell v Information Commissioner EA/2005/0002* in relation to the equivalent provision under the Freedom of Information Act 2000), that records of proceedings whether in paper, electronic or audio tape, are “documents” for the purposes of section 37 of FOISA.
20. Section 37 applies to three classes of court document. Sections 37(1)(a)(i) and (ii) relate to documents lodged with the court or served on or by a Scottish public authority and 37(1)(a)(iii) refers to documents created by a court or its administrative staff. The exemption is absolute, in that it is not subject to the public interest test contained in section 2(1) of FOISA.
21. The Policy Memorandum behind the Freedom of Information (Scotland) Bill made it clear that section 37 is designed to ensure that existing procedures governing access to information generated by or used in court (and other legal dispute resolution) proceedings are not overridden by FOISA. The exemptions in section 37 ensure that where authorities hold information solely because of their involvement in court proceedings, an inquiry or arbitration, they are not required to release it outwith those proceedings. Essentially, the purpose behind section 37 of FOISA is to ensure that the existing right of access to such records is not undermined by FOISA.
22. It is important to note that, in terms of section 3(1) of FOISA, courts are not public authorities for the purposes of FOISA. Sheriffs, and other members of the judiciary, are entirely independent of the SCS and are therefore not answerable to, or employed by, the SCS. The SCS is, however, under section 61 of the Judiciary and Courts (Scotland) Act 2008 (the 2008 Act) responsible for providing staff, buildings, etc. to support Scotland’s courts and the work of the judiciary.
23. The SCS’s submissions on the application of section 37(1)(a)(iii) were in line with those considered in Decision 010/2011. It advised that the arrangements for the recording of the evidence in this specific FAI were straightforward, as the tape recording was made by a clerk of the court, acting in their capacity as an officer of the court and subject to the direction of the presiding Sheriff. The tape recordings were, the SCS explained, retained in the court premises, subject to further directions of the Sheriff.
24. Given that the SCS’s functions (as set out in the statutory provisions set out in the Appendix to this decision) include providing administrative support to the court and that an employee of the SCS recorded the evidence led in the FAI in the capacity of clerk of the court, the Commissioner is satisfied that these audio recordings were created by a member of the court’s administrative staff in the course of court proceedings in line with section 37(1)(a)(iii) of FOISA.
25. Section 37(3) of FOISA excludes from the ambit of the exemption in section 37(1)(a)(iii) information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (the 1976 Act).



26. When invited to comment on the matters raised by this case, Mrs Scott indicated that she did not consider that the audio recordings were made in the course of the proceedings. Rather, she maintained that these were made for the purposes of the FAI. She noted that the FAI was heard over the course of a 13 month period and no transcripts were made; she considered it fair to assume that the audio recordings were a means to aid the Sheriff in his determination, should he choose to use them.
27. In response to this point, the SCS referred to its previous submissions which were considered in Decision 010/2011. These maintained that the ordinary meaning of the words in section 37(3) indicated that it should apply to information that has been compiled to contribute to the process of discovering the circumstances surrounding the death that is the subject of the inquiry. It submitted that the tape recording of the proceedings of the FAI is a record of the Inquiry, a mere product of its occurrence, and therefore appears to it to be unequivocally a court record falling within section 37(1)(a)(iii) of FOISA. The SCS argued that it is not in its view information held for the purposes of an Inquiry, and would therefore not be exempt from section 37 of FOISA by virtue of section 37(3).
28. This question of the application of section 37(3) to the audio recordings under consideration was given full consideration in paragraphs 46 to 49 of Decision 010/2011. The comments set out there are applicable also in this case, and will not be repeated in full here.
29. However, the Commissioner recognised that, while section 37(1) deals with information created, etc. “for the purposes of, or in the course of” proceedings, section 37(3) refers only to information held “for the purposes of” an inquiry. This suggests that Parliament, when drafting the legislation, considered that the two aspects, i.e. “for the purposes of” and “in the course of”, were distinct from one another. Indeed, during the course of the Bill, the phrase “in the course of” was a late amendment to the Bill, to ensure that documents created in the course of proceedings, but not necessarily created for the purpose of those proceedings, were covered by the section 37 exemption.
30. Having considered the circumstances of this case, and the terms of Decision 010/2011, the Commissioner accepts that the audio recording was a product of the occurrence of the FAI (as a record of what took place), and that this information can be distinguished from information which was created with the intention of being analysed during the process of the FAI itself. The Commissioner is therefore satisfied that the audio recording was created “in the course of” an Inquiry instituted under the 1976 Act and not “for the purposes of such an Inquiry”.
31. The Commissioner is therefore satisfied that section 37(3) of FOISA does not apply to the audio recordings sought by Mrs Scott and that the audio recordings are exempt from disclosure under section 37(1)(a)(iii) of FOISA, on the basis that they were created by a member of the court’s administrative staff in the course of the proceedings.



32. The Commissioner is aware that Mrs Scott has very strong reasons for wishing to access the audio evidence of the particular FAI. However, the exemption in section 37(1)(a)(iii) is an absolute exemption which applies in all cases where information is held in a particular type of document. FOISA does not allow consideration of whether the public interest requires disclosure in such cases and so the Commissioner has not considered in this decision the submissions made by Mrs Scott explaining why she considered the information should be disclosed on public interest grounds.

Section 17 – Information not held

33. As noted above, when responding to Mrs Scott's request and request for review, the SCS indicated in terms of section 17 of FOISA that it did not hold the audio recordings that she was seeking. Its review response explained further that while it physically held the recordings, the extent of judicial control meant that the SCS could not be said to hold the information for the purposes of FOISA. Section 3(2)(a)(i) of FOISA states that a public authority does not hold information for the purposes of FOISA if it (physically) holds that information on behalf of another person.
34. In Decision 010/2011, the Commissioner gave consideration at paragraphs 22 to 36 as to whether taped proceedings of the same FAI were held by the SCS for the purposes of FOISA, and concluded that they are held. When invited to comment on the current case, the SCS confirmed that, in the light of the Commissioner's conclusions, it no longer wished to argue that it did not hold the information requested by Mrs Scott.
35. The Commissioner therefore finds that, for the reasons set out in Decision 010/2011, the SCS breached part 1 of FOISA by giving Mrs Scott a notice in line with section 17 of FOISA that the audio recordings were not held by it when responding to her request and request for review.

DECISION

The Commissioner finds that the Scottish Court Service (the SCS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs Scott.

He finds that the audio recordings of the FAI in question are exempt from disclosure under section 37(1)(a)(iii) of FOISA and that, in refusing to disclose them to Mrs Scott, the SCS complied with Part 1 of FOISA.

The Commissioner finds that the SCS breached Part 1 of FOISA in that it held the audio recordings falling within the scope of Mrs Scott's request and was therefore not entitled to respond to the request by giving her notice in terms of section 17(1) of FOISA. However, given that the Commissioner has upheld its reliance on section 37(1)(a)(iii) of FOISA, he does not require the SCS to take any action in response to this failure.

Decision 065/2011
Lorraine Scott
and the Scottish Court Service



Appeal

Should either Mrs Scott or the Scottish Court Service 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 notice.

Margaret Keyse
Head of Enforcement
24 March 2011



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

....

- (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

....

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.

37 Court records, etc.

- (1) Information is exempt information if it is contained in-
- (a) a document-
....
 - (iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings; or
- (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.
- (3) This section does not apply to information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14).



Judiciary and Courts (Scotland) Act 2008

61 Administrative support for the Scottish courts and judiciary

- (1) The SCS has the function of providing, or ensuring the provision of, the property, service, officers and other staff required for the purposes of-
 - (a) the Scottish courts, and
 - (b) the judiciary of those courts.

...

63 Appointments etc. of office holders

- (1) The Scottish Ministers' functions in relation to the officers mentioned in subsection (2) are transferred to the SCS
- (2) Those officers are the holders of the following offices –
 - ...
 - (g) sheriff clerk
 - (h) sheriff clerk depute
 - ...
- (3) Those officers are also members of the staff of the SCS and, accordingly, references in this Act to the staff of the SCS include, except where the context requires otherwise, reference to those officers.