

Decision Notice 100/2020

Correspondence with Sheriffs Principal and the Lord President

Applicant: The Applicant

Public authority: Scottish Courts and Tribunals Service

Case Ref: 201902294



Scottish Information
Commissioner

Summary

The SCTS was asked for evidence considered by the Sheriffs Principal, and for submissions made to the Lord President, about commercial attorneys wearing gowns in sheriff courts. The SCTS told the Applicant that some of the information had previously been provided to him and that it did not hold other information.

The Commissioner found that the SCTS did not hold the information for the purposes of FOISA. This was because it held the information on behalf of the Lord President.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 3(2)(a)(i) (Scottish public authorities); 17(1) (Notice that information is not held)

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 9 September 2019, the Applicant made a request for information to the Scottish Courts and Tribunals Service (the SCTS). The information requested was:
 - a) What evidence was used by the Sheriffs Principal in order to allow them to “fully consider” the request by commercial attorneys to be allowed to wear gowns in sheriff courts?
 - b) What concerns, if any, were identified or raised by the Sheriffs Principal about commercial attorneys wearing gowns?
 - c) What other concerns, if any, were identified or raised by the Sheriffs Principal regarding commercial attorneys conducting litigation in the sheriff courts?
 - d) What submissions were made, if any, to the Lord President regarding items 1 to 3 above?
2. On 10 October 2019, the Applicant wrote to the SCTS requesting a review of its decision, on the basis that it had failed to respond to his request for information.
3. The SCTS notified the Applicant of the outcome of its review on 6 November 2019, apologising for the delay. The SCTS responded to parts a) to c) of the request, providing some explanation and referring the Applicant to previous correspondence, to which it applied section 25(1) of FOISA (Information otherwise accessible) on the basis that the information had been provided previously. In relation to part d), the SCTS advised the Applicant that any information held by the SCTS was held on behalf of the Lord President and was therefore held on behalf of a third party. In terms of section 3(2)(a)(i) of FOISA, therefore, it was not held by the SCTS for the purposes of FOISA.
4. The SCTS further stated that, without prejudice to this view, any information held in terms of FOISA would be considered exempt in terms of section 30(b)(i) and (ii) of FOISA (Prejudice to effective conduct of public affairs).

5. On 23 December 2019, the Applicant wrote to the Commissioner. The Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the SCTS's review because he disagreed with the withholding of the information he had requested. He commented that it was in the public interest for the information to be disclosed.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
7. On 8 January 2020, the SCTS was notified in writing that the Applicant had made a valid application. The SCTS was asked to send the Commissioner the information withheld from the Applicant. The SCTS provided the information and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SCTS was invited to comment on this application and to answer specific questions. In particular, it was asked to justify its reliance on any provisions of FOISA it considered applicable to the information requested.
9. The SCTS explained why it did not consider it held the information for the purposes of FOISA, in terms of section 3(2)(a)(i). The SCTS further submitted that, while it had relied on section 25(1) of FOISA within its review outcome (on the basis that the Applicant was already in possession of the information), the information in question was also held on behalf of the judiciary, and so was not held by the SCTS.

Commissioner's analysis and findings

10. 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 him by both the Applicant and the SCTS. He is satisfied that no matter of relevance has been overlooked.

Whether the information is held by the SCTS

11. 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 are not relevant in this case. The information to be given is that held by the authority at the time the request is received. If the authority does not hold the information, it is required to give the applicant notice in writing to that effect (section 17(1) of FOISA).
12. Section 3(2)(a)(i) of FOISA states that if a Scottish public authority holds the information on behalf of another person (e.g. it is present within the authority's premises and systems only because it is held on behalf of that other person), then the information is not held by that authority for the purposes of FOISA. Consequently, if the information requested is held on behalf of another person, the authority must give the applicant notice under section 17(1) of FOISA.
13. If an authority holds information on behalf of another person, it will not control that information in the same way as it would if it held the information in its own right. The authority would not have the power to delete or amend that information without the owner's

consent, nor would it be able to apply its own policies and procedures to it without such consent. The Commissioner recognises that this is not necessarily a binary question – information may be held on behalf of another person and, at the same time, by the authority itself for its own purposes.

14. In this case, the SCTS gave notice in its review outcome that any information held by it (for part (d) of the request) was held on behalf of the Lord President, referring to section 3(2)(a) of FOISA and stating that the information therefore fell outwith the scope of FOISA. The Commissioner accepts that this response was a notice to the effect that the information was not held. in terms of section 17(1) of FOISA.
15. The SCTS submitted that the Lord President, as head of the judiciary and a judicial office holder, is distinguishable from SCTS as a separate legal entity. It explained the Lord President's functions are set out at section 2 of the Judiciary and Courts (Scotland) Act 2008¹ (the 2008 Act), including – at section 2(2)(a) – responsibility for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts.
16. The SCTS further submitted that the 2008 Act provides that the SCTS will provide administrative support for the Lord President and the judiciary.
17. The SCTS explained that the Judicial Office for Scotland is part of the SCTS and was created as part of the structural changes resulting from the 2008 Act to provide such support to the Lord President. It further explained that the Lord President's Private Office (the LPPO) is part of the Judicial Office and exists solely to support the Lord President in carrying out his functions. As such, the SCTS stated that the LPPO is an emanation of the Lord President and holds information only in fulfilment of its role as his private office.
18. The SCTS submitted that, taking account of the actual information in its possession, it consists of:
 - (a) communication between members of the judiciary, i.e. communications between the Sheriffs Principal (the judiciary) among themselves (which the SCTS claimed was outwith the scope of FOISA because Sheriffs Principal are not listed in schedule 1 of FOISA);
 - (b) communication between the judiciary and the LPPO, i.e. emails from the Sheriffs Principal to LPPO, which the SCTS stated effectively meant emailing the Lord President himself and therefore was also outwith scope for the reasons set out above, and
 - (c) communication from LPPO staff to the Lord President, which again the SCTS submitted fell outwith scope for the reasons as set out above.
19. The SCTS submitted that the Lord President, and other members of the judiciary, are not subject to FOISA as they are not listed in Schedule 1 to FOISA. It submitted that, to the extent that any information regarding submissions made to the Lord President or other members of the judiciary was held within the LPPO, it was held on behalf of the Lord President himself (rather by the SCTS), and is held by the LPPO only by virtue of the Lord President's functions or those of other members of the judiciary to whom the LPPO provide support.

¹ <https://www.legislation.gov.uk/asp/2008/6/contents>

20. The SCTS further submitted and accepted that any information held by the LPPO on behalf of the Lord President, in his capacity as head of the SCTS, would be held for the purposes of FOISA. As explained above, however, the SCTS submitted that the information was held on behalf of the Lord President, otherwise than in his capacity as head of the SCTS – as head of the judiciary.
21. In support of its submissions, the SCTS drew attention to the terms of the Commissioner's *Decision 207/2011 Mr G and the Scottish Court Service* which distinguishes between the administrative functions of the SCTS under the 2008 Act (which are subject to the requirements of Part 1 of FOISA) and functions properly considered those of the judiciary (which are not).
22. The Commissioner has considered all of the submissions provided by the SCTS, in which it states it holds the information on behalf of the Lord President as a separate legal entity and not in his capacity as head of the SCTS.
23. The Commissioner considers that each case has to be considered on its own merits and, in this particular case, having considered the information held and the submissions, the Commissioner is satisfied that the information relates to a judicial function, which falls to be discharged by the Lord President as head of the Scottish judiciary, under section 2(2)(a) of the 2008 Act.
24. The Commissioner is satisfied, therefore, that the SCTS held the information solely on behalf of the judiciary and not on its own behalf. As such, the Commissioner is satisfied that the information requested was not held by the SCTS for the purposes of FOISA and that it was entitled to give notice, in terms of section 17(1) of FOISA, advising the Applicant that the information requested was not held.

Decision

The Commissioner finds that the Scottish Courts and Tribunals Service (the SCTS) complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant, accepting that the information requested was not held by the SCTS for the purposes of FOISA..

Appeal

Should either the Applicant or the SCTS 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

1 September 2020

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.

...

- (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 the information may be made before the information is given.

...

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.

...

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews, Fife
KY16 9DS

t 01334 464610

f 01334 464611

enquiries@itspublicknowledge.info

www.itspublicknowledge.info