

Decision Notice



Decision 113/2012 Mr Arunabha Das Gupta and the Scottish Court Service

Court action and related complaints

Reference No: 201102072
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Scottish Information Commissioner

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Summary

Mr Gupta requested from the Scottish Court Service (the SCS) information relating to the handling of a court action and related complaints. The SCS responded by advising him that the court records were available to him for inspection. Following a review, where the SCS provided a more detailed response to his request, Mr Gupta remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SCS had generally dealt with Mr Gupta's request for information in accordance with Part 1 of FOISA. It had been entitled to withhold information as court records or information otherwise accessible to Mr Gupta, and also to give Mr Gupta notice that it did not hold certain of the information. However, the Commissioner did identify technical failures in the content of the SCS's initial refusal notice.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1), (2)(a) and (d) (Effect of exemptions); 16(1) and (6) (Refusal of request); 17(1) (Notice that information is not held); 19 (Content of certain notices); 25(1) (Information otherwise accessible); 37(1)(a)(iii) (Court Records, etc.)

Rule 4.11 of the Rules of the Court of Session

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendices form part of this decision.

Background

1. On 18 January 2011, Mr Gupta wrote to the SCS requesting information relating to the conduct of staff and the administration of a particular case (to which he was a party) in the Court of Session. Mr Gupta's information request had 11 separate elements. Full details of the request can be found at Appendix 2.



2. The SCS responded on 31 January 2011, referring Mr Gupta to earlier correspondence in which it advised him that the court records for the case he was concerned about were available to him by inspection.
3. On 21 March 2011, Mr Gupta wrote to the SCS requesting a review of its decision. He was not satisfied with the SCS's handling of his request for information.
4. The SCS notified Mr Gupta of the outcome of its review on 26 April 2011, responding to the various elements of his request and providing information in response to points 1 and 9. It did not consider point 2 in the request to contain a valid request for information. It believed point 11 to be a matter for the Court and therefore not subject to FOISA.
5. On the basis that certain of the requested information (points 6(i), 6(ix), 7 and 8) would form part of the court record, it advised Mr Gupta that this information was withheld under section 37 of FOISA: however, it also stated that Mr Gupta could inspect this information as a party to the court action. Similarly, it identified certain information relating to the Rules of Court (points 6(vi), (6)(vii) and 9) as being otherwise accessible to Mr Gupta.
6. Regarding the remainder of the request, the SCS advised Mr Gupta that it did not hold any information in relation to points 3, 4, 5 or 6(ii), (iii), (iv), (v) or (viii). It also identified certain information (point 10) as personal information, which was withheld under section 38 of FOISA.
7. On 27 October 2011, Mr Gupta wrote to the Commissioner, stating that he was dissatisfied with the outcome of the SCS's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Gupta 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

9. On 7 November 2011, the SCS was notified in writing that an application had been received from Mr Gupta.
10. 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 and to explain the manner in which it handled Mr Gupta's request.



11. During the investigation, the SCS advised the investigating officer that it had located a general job description for the Section Manager for the Inner House and Extracts department, which it considered to address (in part) point 6(iv) of Mr Gupta's request. Mr Gupta did not raise the absence of this element of information (which has since been supplied to him) in either his request for review or his application to the Commissioner: in the circumstances, the Commissioner will not consider the matter further.
12. In his application to the Commissioner, Mr Gupta raised no reasons for dissatisfaction in terms of FOISA in relation to points 1, 5 or 6(ii) in his request. While he did indicate dissatisfaction with the SCS's response in respect of point 9, this can only be described as a difference of opinion as to whether a particular Rule of Court was followed in particular circumstances: this is not a matter the Commissioner can consider. Consequently, the SCS's responses on these points will not be considered further in this decision.
13. The relevant submissions received from both the SCS and Mr Gupta will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all relevant submissions made to her by both Mr Gupta and the SCS and is satisfied that no matter of relevance has been overlooked.
15. Mr Gupta's request relates (for the most part) to a motion he enrolled with the Court. It is important to explain at the outset that courts are not Scottish public authorities for the purposes of section 3(1) FOISA. Sheriffs and other members of the judiciary are entirely independent of the SCS. However, under section 61 of the Judiciary and Courts (Scotland) Act 2008, the SCS (which is a Scottish public authority) is responsible for providing staff, buildings etc. to support Scotland's courts and the work of the judiciary. Only to the extent that the SCS held the information requested by virtue of these administrative functions would it be held for the purposes of FOISA.

To what extent did Mr Gupta make valid information requests?

16. The SCS advised that it did not consider point 2 to contain a valid request for information.
17. Section 1(1) of FOISA states that a person who requests information from an authority which holds it is entitled to be given it by the authority. This right is then limited by various provisions contained elsewhere in Parts 1 and 2 of FOISA. "Information" is defined in section 73 of FOISA as "information recorded in any form". Given this definition, it is clear that FOISA does not usually require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form (e.g. about a person's intentions or opinions).



18. FOISA does not therefore extend to requests for views, opinions or explanations, nor does it not apply to details of actions, unless information on these matters is held in recorded form at the time the request is received.
19. Having considered carefully the wording of point 2, the Commissioner accepts that it cannot reasonably be construed as seeking recorded information. Equally, the Commissioner cannot accept that point 3 (which is inextricably linked to point 2) can be construed as containing a request for recorded information, when considered in the particular circumstances of this case.
20. The Commissioner will not, therefore, consider points 2 and 3 further in this decision. Consequently, her decision is limited to consideration of points 4, 6(i), 6(iii), 6(iv) (part), 6(v) - (ix), 7, 8, 10 and 11.

Section 37(1)(a)(iii) - court records

21. The SCS relied upon section 37(1)(a)(iii) of FOISA in dealing with points 6(i), 6(ix), 7, 8, 10 and 11 of Mr Gupta's request, advising that the information sought formed part of a court process, relating to an action in which he was a party.
22. 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. The authority must hold the information solely because it is contained in such a document.
23. Section 37 of FOISA 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, for the purposes of proceedings. Section 37(1)(a)(iii) relates to documents created by a court or its administrative staff for such purposes. The exemption is absolute, in that it is not subject to the public interest test contained in section 2(1) of FOISA.
24. The Policy Memorandum behind the 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 exemption ensures 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 arrangements for access to such records are not undermined by FOISA.
25. In applying this exemption, the SCS referred to the Rules of Court, specifically Rule 4.11 which is set out in Appendix 1 to this decision. This Rule provides for the inspection of the documents forming the court process in a particular action, in the Office of the Court, by any person having an interest.



26. With specific reference to point 11, the SCS advised that its original approach was to find this was not a valid request for information, as it concerned the actions of a judicial office holder. It had reached this view on the understanding that Mr Gupta was asking for information relating to the rationale or thought process behind the judicial decision. On reflection, the SCS believed Mr Gupta request was seeking the outcomes of the four motions he referred to. The SCS advised that the outcome was that a court order was pronounced and recorded in the process as an interlocutor: these records were exempt from disclosure in terms of section 37(1)(a)(iii). The Commissioner accepts that any information covered by point 11 and held by the SCS would fall within this description.
27. It is clear to the Commissioner that the information sought by Mr Gupta and covered by points 6(i), 6(ix), 7, 8, 10 and 11 would have been created by the SCS or its staff for the purposes of the action raised by Mr Gupta. Consequently, it would fall within the description of information covered by section 37(1)(a)(iii).
28. Before concluding whether section 37(1)(a)(iii) has been applied correctly, the Commissioner must consider whether the information in question was held by the SCS solely by virtue of being contained in a document falling within the category described in section 37(1)(a)(iii).
29. Having considered the relevant points in Mr Gupta's request, and the functions of the SCS, the Commissioner is satisfied that the SCS held the information solely because it was contained in documents created by the court or its staff for the purposes of proceedings. The Commissioner is therefore satisfied that the SCS was correct in its reliance upon section 37(1)(a)(iii) in responding to these requests.
30. In reaching this conclusion, the Commissioner notes that Mr Gupta has previously been advised by the SCS as to how he, as a party to the action, can access the court documents in question.

Information not held

31. The SCS cited section 17(1) of FOISA in response to points 4, 6(iii) - (v) and 6(viii).
32. 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 certain 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. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). 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.
33. In relation to points 4, 6(iii) and 6(v), the SCS advised that the information was not held as the meetings or other actions referred to did not take place. With reference to point 6(iv) (insofar as under consideration here), the SCS advised that the Lord President did not require to approve the appointment in question.



34. With reference to request 6(viii), Mr Gupta sought the rules the SCS staff were following in investigating his allegations. In response the SCS advised him that there were no such specific rules. In response to the investigating officer's questions, the SCS advised that it does not have relevant rules but did have a formal complaints procedure, details of which were available on its website. In the circumstances, the Commissioner considers it highly unlikely that this was what Mr Gupta was seeking.
35. Having considered the nature of the information requested and the explanations provided by the SCS, the Commissioner is satisfied that the SCS was correct to rely on section 17(1) of FOISA in response to points 4, 6(iii) - (v) and 6(viii).

Requests 6(vi) and 6(vii) - information otherwise accessible

36. Section 25(1) of FOISA provides that information which the applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25(1) is absolute.
37. The SCS relied upon section 25(1) in relation to points 6(vi) and (vii) in Mr Gupta's request. In these requests Mr Gupta was specifically asking the SCS to identify the Rules of Court followed in relation to certain actions.
38. In response to these requests, the SCS advised Mr Gupta that the Rules of Court were in the public domain and were available on the SCS website¹, identifying chapters 6 and 40 as being of particular relevance to his request. In addition, the SCS confirmed to the investigating officer that the Rules could be purchased, were available in libraries and could also be accessed by visiting the Offices of the Court of Session.
39. It does not appear to be disputed by Mr Gupta that the Rules of Court are publicly available, although he does express dissatisfaction at having to access the information through the internet. However, the Commissioner sees no reason why at least some of the means of access identified by the SCS could not be used by Mr Gupta: while not all of these may have been made clear to him by the SCS in dealing with his request, the Commissioner does not believe identifying alternative means of access would involve undue enquiry on Mr Gupta's part.
40. Having considered the relevant submissions, the Commissioner is satisfied that the Rules of Court were reasonably obtainable by the applicant other than requesting them under section 1(1) of FOISA.

¹ <http://www.scotcourts.gov.uk/session/rules/print/index.asp>



Handling of Mr Gupta's request

41. Mr Gupta was not satisfied with the content of the SCS's initial response to him. While not all of his concerns are capable of being addressed as potential breaches of FOISA or the associated Codes of Practice, the Commissioner does find that, while refusing to provide information in response to Mr Gupta's request, the letter failed to meet the requirements of a valid refusal notice set down in sections 16(1), 16(6) and 19 of FOISA.
42. The Commissioner acknowledges, however, that after reviewing its handling of Mr Gupta's information request, the SCS recognised this failure, apologised to Mr Gupta and provided him with a full review response. As a consequence, the Commissioner does not require the SCS to take any action in relation to the failure.
43. Mr Gupta was also dissatisfied with the conduct of the SCS's review, believing that it was not carried out in an objective manner and failed to follow the relevant "Scottish Executive" guidelines. Mr Gupta appears to believe the SCS to be an Executive Agency of the Scottish Ministers (which it had ceased to be by the time of his request: under the Judiciary and Courts (Scotland) Act 2008, it is an independent statutory body), on which basis he may be referring to internal guidance which is not in fact relevant. However, for the purposes of dealing with this aspect of Mr Gupta's dissatisfaction, the Commissioner has taken the guidance in question to be the Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under FOISA and the EIRs (the Section 60 Code), applicable to all Scottish public authorities.
44. The SCS submitted that it carried out a fair and impartial review. This had considered previous relevant correspondence and had resulted in Mr Gupta being provided with an individual response to each of the questions in his original request. This appears to be borne out by the terms of the review outcome sent to Mr Gupta on 26 April 2011. The review was carried out by a member of staff who was not involved in the original decision, recognised previous failings in the handling of his request and provided Mr Gupta with a response to each element of his request. In other words, the SCS appears to have considered the matter afresh and complied with the guidance in section 5.4 of the Section 60 Code.
45. Mr Gupta also appears to be concerned that the review considered the possibility that Mr Gupta's request might be vexatious, in terms of section 14(1) of FOISA. However, this was a potential outcome within Part 1 of FOISA and the SCS was entitled to consider it. In fact, it did not choose to pursue that option and dealt with each of Mr Gupta's points individually under other provisions in FOISA. In this decision, it would not be appropriate for the Commissioner to consider the applicability of section 14(1) to any element of Mr Gupta's request.
46. In the circumstances, the Commissioner is unable to find any support for Mr Gupta's concerns in relation to the handling of his review.



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 requests made by Mr Gupta. In withholding information under exemptions or giving Mr Gupta notice that it was not held, the SCS complied with Part 1.

However, in failing to provide an adequate refusal notice in its initial response to Mr Gupta's request, the SCS failed to deal with the request in accordance with sections 16(1), 16(6) and 19 of FOISA.

Given that Mr Gupta's request was responded to appropriately at review stage, the Commissioner does not require the SCS to take any action in respect of this failure in response to Mr Gupta's application.

Appeal

Should either Mr Gupta 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
9 July 2012



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.
- ...
- (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 –
- (a) section 25;
- ...
- (d) section 37; and
- ...



16 Refusal of request

- (1) Subject to section 18, a Scottish public authority which, in relation to a request for information which it holds, to any extent claims that, by virtue of any provision of Part 2, the information is exempt information must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice in writing (in this Act referred to as a "refusal notice") which-
- (a) discloses that it holds the information;
 - (b) states that it so claims;
 - (c) specifies the exemption in question; and
 - (d) states (if not otherwise apparent) why the exemption applies.

...

- (6) Subsections (1), (4) and (5) are subject to section 19.

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).

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

...

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

...

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

...



Rules of Court of Session – Chapter 4

Documents not to be borrowed

- 4.11.- (1) Subject to paragraph (2), a writ shall remain in the Office of Court and shall not be borrowed from process, but may be inspected by any person having an interest.
- (2) Paragraph (1) shall not apply to-
- (b) a party borrowing his principal writ for the purposes of service or intimation; or
 - (c) a party borrowing his writ for the purpose of writing on it and authenticating an amendment which has been made.
- (3) The following steps of process shall not be borrowed from process:-
- (a) the inventory of process;
 - (b) the interlocutor sheet;
 - (c) the motion sheet;
 - (d) the minute of proceedings;
 - (e) any inventory of productions;
 - (f) the principal copy of a report ordered by the court and lodged in process;
 - (g) the principal or any copy of a bond of caution or a consignment receipt lodged in process; and
 - (h) the principal copy of any other document by which an order of the court to find caution or give security is satisfied and lodged in process until the order is recalled.



Appendix 2

Mr Gupta's request

1. The date you received my said letter of 1 November 2010.
2. The reason why you did not respond to the said letter.
3. Which particular Civil Service rules(s) you were following in deciding not to respond to my said letter.
4. What are the dates on which you interviewed the Civil Servants listed on page 1 of this letter in dealing with my said queries against them?
5. Please provide copies of records of such interviews with the 5 Civil Servants listed on page 1 of this letter.
6. Please provide copies of:
 - i. Entries made by your various clerks on the Court of Session process (for recording motions, interlocutors, inventory of productions and minutes of proceedings);
 - ii. Records of your conversations on various dates with the Lord President (Lord Hamilton) about the conduct of Lord Nimmo Smith and the five Civil Servants listed on page 1 of this letter;
 - iii. The minutes of your meetings with the Lord President to discuss changes to the published rules for dealing with Sheriff Court appeals;
 - iv. Documents recording the Lord President's approval to [named individual]'s appointment as "Appeal Manager" and details of his functions, duties and responsibilities to be discharged, whilst working flexi-time from one of the benches of the basement office (without any window) of the Petition Department without any staff to help him;
 - v. Records of meetings between [named individual] (*vide* her letter of 2 June 2010 to myself) of the Office of the Keeper of the Rolls and an employee of Simpson & Marwick, Solicitors (representing West Lothian Council), to fix a diet for the hearing of the instant appeal on the Summar Roll;
 - vi. The Rules of Court 1995 (as amended) [named individual] was following in:
 - a) Not fixing the said diet on the Summar Roll, a clear, precise and unequivocal order of the Inner House of 24 March 2010 to fix the said hearing notwithstanding; and
 - b) Fixing a By Order hearing of 1 July 2010 requiring my attendance at such a hearing without notifying me of the purpose of such By Order hearing and in full knowledge of my illness;



- vii. The Rule of Court 1993 (as amended) [named individual] was following in not providing the information sought in my letter of 15 June 2010 to the Keeper of the Rolls when he [named individual] wrote to me on 18 June 2010.
 - viii. The Civil Service or Scottish Court Service rules you were following in investigating into my said allegation of misconduct against the said Civil Servants; and
 - ix. The appeal print where you “found” an entry relating to the note of Sheriff William Muirhead (supra) in respect of his interlocutor of 15 December 2008.
7. The date on which the Sheriff Clerk at Linlithgow sent to your Deputy Sheriff Muirhead’s “note” to his interlocutor of 15 December 2008, referred to at (ix) above.
 8. The date on which the said “note” was received by your Deputy.
 9. The Rule of Court 1993 (as amended) your staff were following in placing my unopposed motions (including the motion seeking an order of the Inner House for Sheriff Muirhead’s said note to his interlocutor of 15 December 2008.
 10. The full name of the Clerk who placed my said 4 motions (all unopposed) before the said Lord Ordinary and the date on which the said motions were so placed before the said Lord Ordinary.
 11. Details of the actions(s) the said Lord Ordinary took in respect of the said 4 unopposed motions.