



Scottish Information
Commissioner

Decision 153/2007 Mrs D Otter and the Executive

Documents related to an appeal

Applicant: Mrs D Otter
Authority: The Executive
Case No: 200601801
Decision Date: 24 August 2007

Kevin Dunion
Scottish Information Commissioner

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Decision 153/2007 Mrs D Otter and the Executive

Consultations between appeal panel members and other staff of SEERAD and related documentation – information not held – decision upheld by Commissioner

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement); 10(1) (Time for compliance); 17 (Notice that information is not held); 19(b) (Content of certain notices); 21(1) (Review by Scottish public authority).

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

Facts

Mrs Otter submitted an information request to the Scottish Executive (the Executive) for information as to what consultations took place between the members of an appeal panel and other SEERAD staff over a particular time period, along with related documentation.

The Executive responded by advising Mrs Otter that it did not hold any information which would address her request.

Mrs Otter was not satisfied with this response and asked the Executive to review its decision. The Executive carried out a review and, as a result, notified Mrs Otter that it upheld its original decision that it did not hold any information which would address Mrs Otter's request.

Mrs Otter remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Executive had partially dealt with Mrs Otter's request for information in accordance with Part 1 of FOISA, having found correctly that the information requested was not held but also having failed to comply with certain technical provisions of FOISA.



Background

1. On 8 January 2006, Mrs Otter wrote to the Executive requesting the following information:

What consultations took place [between members of an appeal panel and other staff of SEERAD, or the Scottish Executive Environment and Rural Affairs Department] and a copy of (a) all correspondence on this matter, from the time of the hearing until the issuing of the report, and (b) of any note or memorandum that was made in relation to any correspondence or to any discussion that took place.

2. On 6 July 2006, the Executive wrote to Mrs Otter in response to her request for information. The Executive interpreted Mrs Otter's request as one for information relating to consultations between members of the appeal panel and indicated that it did not hold any information which would address her request. The Executive did not cite any section or exemption(s) in FOISA in its response to Mrs Otter, or provide her with details of her right to request a review of its decision or of her right to apply to me for a decision.
3. On 6 August 2006, Mrs Otter wrote to the Executive requesting a review of its decision. In particular, Mrs Otter drew the Executive's attention to the full terms of her information request, arguing the part referring to other members of SEERAD and not just to those on the appeal panel. Mrs Otter also highlighted to the Executive the fact that she had not been made aware of her right to seek a review of their response.
4. On 11 October 2006, the Executive wrote to notify Mrs Otter of the outcome of its review. The Executive upheld its original decision that it did not hold any information which would address Mrs Otter's request, stating that there were no discussions or memoranda referring to her appeal. In this response the Executive did indicate that it had identified some information, by way of a draft appeal report which had been circulated among members of the appeal panel and which showed changes made by the members, but that it considered that this was exempt under section 30(b)(ii) of FOISA.
5. On 13 November 2006, Mrs Otter wrote to my Office, stating that she was dissatisfied with the outcome of the Executive's review and applying to me for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Mrs Otter had made a request for information to a Scottish public authority and had applied to me for a decision only after asking the authority to review its response to that request.



The Investigation

7. On 11 January 2007, the Executive was notified in writing that an application had been received from Mrs Otter and asked to provide my Office with its comments, all in terms of section 49(3)(a) of FOISA. Specifically, the Executive was asked to provide full details of the steps taken to establish whether it held the information requested. The Executive responded on 6 February 2007 and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted the Executive, asking it to provide comments on the application and to respond to specific questions on it (with particular reference to the adequacy of searches carried out to establish what relevant information was held). I will consider the Executive's arguments in greater detail in my analysis and conclusions below.

The Commissioner's Analysis and Findings

9. In coming to a decision on this matter, I have considered all of the information and the submissions that have been presented to me by both Mrs Otter and the Executive and am satisfied that no matter of relevance has been overlooked.
10. As indicated already in this decision notice (see paragraph 1 above), Mrs Otter made a request to the Executive for information as to what consultations took place between the members of the appeal panel and other staff of SEERAD, and to be given a copy of all correspondence on this matter, from the time of the hearing until the issue of the report, and of any note or memorandum that was made in relation to any correspondence or any discussion that took place. In its responses to Mrs Otter, the Executive misinterpreted Mrs Otter's request and dealt with it as one for information between the panel members and not between the panel members and other staff of SEERAD. The Executive did advise Mrs Otter that, apart from routine post hearing procedures in connection with the production of the panel report, there were no further exchanges, written or otherwise between the panel members from the time of the hearing until the report was issued. The Executive advised Mrs Otter that as a result there was no information that could be supplied to her.



11. As mentioned already at paragraph 4 above, in responding to Mrs Otter's request for a review the Executive identified information which had passed between the panel members during the time between the appeal hearing taking place and the report being issued. Although the Executive has highlighted this information to Mrs Otter, this will not be considered as part of this investigation as this information does not fall within the scope of Mrs Otter's request, which was for information relating to consultations between panel members and other staff of SEERAD. This investigation will only consider the Executive's assertion that it held no information falling within the scope of the request .

Section 17 – Notice that information is not held

12. In order to determine whether the Executive was correct to cite section 17 of FOISA in respect of the information that Mrs Otter was seeking, I must be satisfied that the Executive does not hold (and did not hold at the time it dealt with Mrs Otter's request) information which would meet her request.
13. The Executive recognised in its submissions to me that it had misunderstood Mrs Otter's request for information and as a result responded to a request for information relating to consultations between panel members and not consultations between panel members and other SEERAD staff. The Executive has, however, re-affirmed its stance that it does not hold any information which would address Mrs Otter's request for information on consultations between panel members and other SEERAD staff, and therefore its reliance on section 17 of FOISA.
14. In its submissions to my Office, the Executive has advised that it asked the members of staff who had been on the appeals panel for Mrs Otter's case whether there had been any consultation with other members of SEERAD staff regarding Mrs Otter's appeal. The Executive has advised that these members of staff stated that there had been no consultations between panel members and other members of SEERAD staff in relation to the decision or the report and as such there was no correspondence, or any memoranda or notes of discussions, on this matter.



15. The Executive also explained that checks of the electronic Record and Document Management system (eDRM) for any information had given a negative return, as had a search of another database system of relevant agricultural records, both using a variety of relevant key words. The Executive stated that a search of paper files was also carried out and there were no records of any meetings between the appeals panel and any other groups between the hearing on 10 March 2006 and the report being issued on 22 April 2006. A search was also carried out at the Lairg office of SEERAD (the location, the Executive advised, of the only other SEERAD staff with a possible interest in this matter) and this showed that there was no correspondence of any kind between that office and the members of the appeals panel after the hearing on 10 March 2006.
16. Having considered the submissions that have been made by the Executive, I am satisfied that it has carried out thorough searches and that the information that Mrs Otter is seeking is not held by it (and was not so held at the time of Mrs Otter's request). I am therefore satisfied that the Executive relied on section 17 of FOISA correctly in its response to Mrs Otter. I must record my concern, however, that the Executive did not (and could not have, given its misinterpretation of the request) carry out adequate searches for the information requested until after the commencement of my investigation.

Technical Breaches

17. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from receipt of the request to comply with a request for information. I note that the Executive did not respond to Mrs Otter's information request within 20 working days, contrary to section 10(1) of FOISA and that when it did eventually respond it did not advise Mrs Otter of her right to seek a review of its decision, or her right to apply to me for a decision. This was a breach of section 19(b) of FOISA.
18. I also note that the Executive did not respond to Mrs Otter's request for a review within 20 working days, as is required under section 21(1) of FOISA.
19. In its submissions to me, the Executive explained that due to the lengthy supplement to Mrs Otter's letter of 8 January 2006, together with the fact that there was no indication in this letter that an FOI request was included, the FOI request outlined in this letter had been overlooked. The Executive explained that it was only during a meeting of 21 June 2006 between Mr and Mrs Otter and SEERAD that it became aware that Mrs Otter had made an FOI request.



20. While I do not require the Executive to take any action in relation to these technical breaches, as I am satisfied that they did not curtail Mrs Otter in exercising her rights, I would point out that there is no requirement under FOISA for an applicant to cite FOISA when making an FOI request. Further where I accept that Mrs Otter's letter of 8 January 2006 is lengthy it is clear from reading the letter in its entirety that an information request has been made.

Decision

I find that the Scottish Executive (the Executive) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mrs Otter.

I find that by relying on section 17 of FOISA, the Executive complied with Part 1 of FOISA.

However, in failing to respond to Mrs Otter's information request within 20 working days and failing to advise her of her right to seek a review of its response and to apply to me of a decision, and in failing to respond to Mrs Otter's request for review within 20 working days, the Executive failed to comply with sections 10(1), 19(b) and 21(1) of FOISA respectively.

Given that these technical breaches did not curtail Mrs Otter in exercising her rights, I do not require the Executive to take any specific action in response to these failures.



Appeal

Should either Mrs Otter or the Executive 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 of receipt of this decision notice.

Kevin Dunion
Scottish Information Commissioner
24 August 2007



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.

10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after-
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request;

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

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.