



Scottish Information
Commissioner

**Decision 205/2007 Ms K and the Scottish
Children's Reporter Administration**

*Requests for a copy of documents associated with a Children's
Panel Hearing*

Applicant: Ms K

Authority: Scottish Children's Reporter Administration

Case No: 200700079 and 200700258

Decision Date: 31 October 2007

**Kevin Dunion
Scottish Information Commissioner**

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Decision 205/2007 Ms K and the Scottish Children's Reporter Administration

Requests for copies of documents associated with a Children's Panel Hearing – Commissioner upheld decision to withhold information under section 38(1)(b) of FOISA

Relevant Statutory Provisions and Other Sources

Freedom of Information (Scotland) Act 2002 (FOISA): sections 1(1) (General entitlement); 10(1) (Time for compliance); 11 (Means of providing information); 16(1) (Refusal of request); 19 (Content of certain notices); 38(1)(b), (2)(a)(i) and (3) (Personal information)

Data Protection Act 1998 (the DPA): section 1 (Basic interpretative provisions) (definition of "personal data"; section 2 (Sensitive personal data); Schedule 1, Part 1, paragraph 1 (The first data protection principle) and Schedule 2 (Conditions relevant for purposes of the first principle: processing of personal data) (condition 6(1))

Disability Discrimination Act 1995 (the DDA): section 21(1) (Duty of providers of services to make adjustments)

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

Facts

Ms K made two separate requests for copies of documents regarding a Children's Panel Hearing and other associated documents from the Scottish Children's Reporter Administration (SCRA). SCRA withheld the information on both occasions. Ms K was dissatisfied with these responses and asked SCRA to review its decisions. SCRA carried out reviews for both requests; it released some information in response to request 1 and withheld the remaining information under sections 37 and 38 of FOISA. Ms K remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that SCRA had correctly withheld the information under section 38(1)(b) of FOISA, but had failed on several technical aspects of FOISA. Since the requested information was correctly withheld, he did not require SCRA to take any further action.



Background

1. It was decided that, due to the similarities in the information requested by Ms K and the duplication of information in the two applications that both applications should be conjoined and the withheld information considered in one decision.

Request 1

2. On 13 October 2006, Ms K wrote to SCRA requesting:
 - copies of documents sent to a family regarding a Children's Panel Hearing between December 2005 and February 2006.
 - records of when a request for a copy of the Children's Panel Hearing decision was received and when it was attended to.
 - if no records exist, a copy of the post book entries related to the above request showing whom mail is sent to.

Ms K asked for the information to be provided with personal information removed, except for the house number.

3. SCRA provided a written response to Ms K on 26 October 2006, stating that the information she was seeking was held by SCRA under the terms of the DPA and was confidential information. SCRA stated that since Ms K was not asking for information in the capacity of a local authority employee working with the family, SCRA considered that Ms K was not entitled to receive the information.
4. On 6 November 2006, Ms K wrote to SCRA requesting a review of its decision. In particular, Ms K explained that she had requested the information with the personal information removed and SCRA had not complied with section 16 of FOISA. Ms K also provided four options to SCRA as to how she could obtain the information required. Additionally Ms K requested the response to be sent in Braille as she had difficulty reading parts of the scanned response.
5. SCRA responded to Ms K's request for review on 20 December 2006. SCRA provided a partial response to her questions and
 - (Question 1) withheld the information under section 38 of FOISA.
 - (Question 2) stated that it did not hold any information regarding this question.
 - (Question 3) provided a list of when correspondence was received and sent regarding the particular case and
 - stated that a Braille copy of its response would be issued shortly. The Braille copy was issued on 10 January 2007.



Request 2

6. On 7 November 2006, Ms K wrote to SCRA requesting copies of documents associated with a Children's Panel Hearing regarding a named family. Ms K asked for the information to be provided with all the personal information removed and in Braille.
7. SCRA provided a written response to Ms K on 20 December 2006 advising her that it was withholding the requested information under section 38 of FOISA. A Braille copy of this refusal notice was provided to Ms K on 10 January 2007.
8. On 18 January 2007, Ms K emailed SCRA requesting a review of its decision. In particular, Ms K explained that she required the documents with all personal information removed and proposed four options to SCRA as to how she could obtain the information required. She again requested that this information be provided in email or Braille.
9. SCRA emailed Ms K on 15 February 2007 advising her that it had upheld its original decision to withhold the information under section 38 of FOISA. It also considered that some of the information should be withheld under section 37 of FOISA.

Applications to the Commissioner

10. On 17 January 2007 and 20 February 2007, Ms K wrote to my Office, stating that she was dissatisfied with the outcome of SCRA's reviews of both her requests and applying to me for a decision in terms of section 47(1) of FOISA.
11. The applications were validated by establishing that Ms K had made requests 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 those requests.
12. On 2 February 2007 and 16 March 2007 SCRA was notified in writing that applications had been received from Ms K and was asked to provide my Office with specified items of information required for the purposes of the investigation. SCRA responded on 26 February 2007 and 12 April 2007 respectively with the information requested and the case was then allocated to an investigating officer.

The Investigation

13. The investigating officer wrote to SCRA on 28 March 2007 and 1 May 2007 asking it for comments on the applications.
14. Between April and September 2007, the investigating officer also corresponded with Ms K to obtain further information regarding her applications.



15. On 2 October 2007, the investigating officer emailed SCRA to ask it for further evidence as to the searches it had undertaken to ascertain whether a request for a copy of the Children's Panel Hearing decision had been received by SCRA (request 1, question 2). SCRA responded on 15 October 2007 stating that numerous files were held regarding the family in question. Each file was manually searched and SCRA stated that the correspondence that Ms K had requested was not held by SCRA.

The Commissioner's Analysis and Findings

16. In coming to a decision on this matter, I have considered all of the information and submissions that have been presented to me by Ms K and SCRA. I am satisfied that no matter of relevance has been overlooked.
17. I shall firstly consider whether SCRA was entitled to withhold information from Ms K. All of the documents withheld from Ms K have been withheld under section 38(1)(b) of FOISA. (Six of these documents have, in addition, been withheld under section 37 of FOISA.)
18. I shall then go on to consider whether I agree with SCRA's statement that it does not hold any information to answer Ms K's second question (of request 2).
19. When requesting SCRA to review its decision in relation to each of her information requests, Ms K suggested four alternative ways in which she could obtain the information she was looking for. She suggested that consent could be sought from the client for the information to be released to her or that she could be given an opportunity to view the papers and make notes under supervision. She also suggested that two other individuals could request to see the papers.
20. I can only come to a decision regarding Ms K's applications to this Office and on her rights under FOISA. So, although I will comment on Ms K's suggestions for obtaining the information herself, I will not comment on the other suggestions made by Ms K as to other organisations/people making a request for the same information.

Section 38(1)(b) personal information

21. As noted above, SCRA applied section 38(1)(b) to all of the information it withheld from Ms K. This section, read in conjunction with section 38(2)(a)(i) (or, as the case may be, section 38(2)(b)), exempts personal data from release if its disclosure would contravene any of the data protection principles set out in Schedule 1 of the DPA.
22. I must therefore consider whether the information in question is personal data and, if so, whether the disclosure of the information would breach the data protection principles.
23. Having carefully reviewed the content of the documents, I am satisfied that the information in the withheld documents is the personal data of the third parties concerned. Individuals can clearly be identified from the documents, or from the documents and other information held by SCRA. The information relates to the data subjects.



24. I am also satisfied, taking into account the definition of “sensitive personal data” in section 2 to the DPA, that the documents contain sensitive personal data relating to some of the individuals.
25. In this instance, SCRA asserted that release of the information would breach the first data protection principle. I must therefore consider whether the disclosure of the personal information (not just to Ms K, but into the public domain, because that is the effect of FOISA) would be fair and lawful. I must, in particular, be satisfied that at least one of the conditions in schedule 2 to the DPA can be met (and, in addition, in the case of the sensitive personal information contained in the documents, that at least one of the conditions in schedule 3 to the DPA can be met).
26. I will start off by considering the conditions in schedule 2 to the DPA. Condition 6.1 would appear to be the only condition which might permit the disclosure of the information in this case and so I will look at that condition in more detail.
27. I am aware of the background to Ms K’s requests and can accept that she has a legitimate interest in gaining access to the information. Given that Ms K has no immediate means of obtaining such information, I also accept that disclosure of the information withheld by SCRA might be considered necessary for the purposes of her legitimate interest. I have also considered whether the public in general would have a legitimate interest in gaining access to this information, given that, as noted above, disclosure of the information under FOISA would have the effect of putting the information into the public domain, and not just of allowing Ms K to see the information. Given the subject matter of the information, I am not satisfied that the public does have a legitimate interest in the information, beyond that of ensuring that a publicly funded body is properly carrying out its functions.
28. On the other hand, the persons to whom the information relates have a strong legitimate interest in keeping their family circumstances confidential. They cannot have any expectations that this information would be made publicly available.
29. On occasion third parties could be approached by the public authority to ask them to consent to their personal data being released (this was one of the options suggested by Ms K). However, taking into account matters such as the age and number of the individuals whose personal data is contained in the documents, and the subject matter of the information, I do not consider that seeking consent was a step which SCRA might reasonably have been expected to take.
30. In all the circumstances of this case, having weighed the competing interests in disclosure and in the privacy of the individuals concerned, I am satisfied on balance that disclosure of the information under FOISA into the public domain is unwarranted by virtue of the rights, freedoms and legitimate interests of the individuals to whom the information relates and, therefore, that condition 6.1 cannot be met. Noting in particular the circumstances of this case, I can identify no other condition in Schedule 2 which might be relevant to the processing of the information withheld. Given that I have found that there are no conditions in Schedule 2 to the DPA which would permit the processing of the information (here, disclosure of the information into the public domain), I am satisfied that disclosure of this information would breach the first data protection principle. Accordingly, I must find that the information is exempt under section 38(1)(b) of FOISA.



31. In addition, I would note that I can identify no condition within Schedule 3 which would permit the processing of the sensitive personal data included in the documents withheld from Ms K.
32. As noted above, Ms K also suggested that the information could be provided to her with any personal data redacted, with the exception of the house number. Having considered the information that would have to be redacted from the documents in order not to disclose any personal data, I do not consider that this would be feasible. All that would remain would be the standard words and sentences that appear on such SCRA standard documentation and such a redacted document simply would not fulfil Ms K's request for information.
33. Another suggestion made by Ms K was that she should be allowed to view the documents in situ, with an individual from SCRA present at the time. However, this would still result in the personal data of third parties, including sensitive personal data, being released to Ms K and, given that I have found this information to be exempt, I do not consider this to be an appropriate way forward under FOISA.
34. In conclusion, I am satisfied that SCRA acted correctly in withholding this information under section 38(1)(b) of FOISA. Since I am satisfied that the information was correctly withheld under section 38(1)(b) of FOISA, I do not intend to consider SCRA's reliance on section 37 of FOISA.

Question 2 of Request 1

35. Ms K was also dissatisfied with SCRA's assertion that it did not hold any information in relation to question 2 of request 1:
"records of when a request for a copy of the Panel Hearing decision was received and when it was attended to."
36. SCRA advised my Office that it had searched its records and concluded that it did not hold any such request.
37. The investigating officer asked SCRA on 2 October 2007 if it could undertake another search for this request. SCRA undertook a manual search of its files (referred to above) and the request could not be located.
38. Taking into account SCRA's submissions and the steps it has taken to determine whether or not the request exists or is held by it, I am satisfied that SCRA does not hold this information.

Technical breaches of FOISA

Section 16 of FOISA

39. SCRA's response, dated 26 October 2006, to request 1 explained that the information requested would not be supplied for a number of reasons. However, this notice did not state that any exemption contained in Part 2 of FOISA applied to this information.



40. When notifying Ms K of the outcome of its review, SCRA later confirmed that it considered the withheld information to be exempt from disclosure under the terms of section 38(1)(b) of FOISA.
41. When a request for information is received under the terms of section 1 of FOISA, the information must be provided unless one of a limited number of circumstances applies. These are where an exemption in Part 2 of FOISA applies to that information; where the cost of complying with the request would exceed the £600 prescribed limit; or where the request has been judged to be vexatious or repeated for the purposes of section 14 of FOISA.
42. When an authority refuses to supply information, section 16 of FOISA requires that it explain its reasons for doing so in these terms. In this case, the refusal notice from SCRA did not comply with section 16(1)(a) to (d) of FOISA.
43. Since SCRA did provide reasons and cited exemptions under FOISA for withholding the information in its response to Ms K's request for review, I do not require any remedial steps to be taken in response to this technical breach.

Section 19 of FOISA

44. Section 19 of FOISA requires that when notifying an applicant in terms of section 17 of FOISA that the information requested is not held, the notice should provide details of:
 - a) the authority's procedure for dealing with complaints about the handling of requests for information;
 - b) the right to request a review in terms of section 20 of FOISA; and
 - c) the right to make an application for a decision by the Scottish Information Commissioner under section 47(1) of FOISA.
45. SCRA's response to Ms K of 26 October 2006 (request 1) did not contain any of the particulars detailed above. Accordingly, I find that SCRA failed to comply with the requirements of section 19 of FOISA. However, since Ms K subsequently made a request for review (to which SCRA responded), I consider that Ms K was not prejudiced by this failure and I do not require any remedial steps to be taken by SCRA in respect of this breach.

Timeous Response

46. Section 10(1) of FOISA requires a Scottish public authority to comply with a request for information not later than the twentieth working day after receipt by it of that request. SCRA responded to request 2 outwith this timescale; therefore SCRA breached Part 1 of FOISA as a consequence.
47. Section 21(1) of FOISA requires a Scottish public authority to comply with a requirement for review not later than the twentieth working day after receipt by it of the requirement. SCRA responded to Ms K's request for review (request 1) outwith this timescale; therefore SCRA breached Part 1 of FOISA as a consequence.



Section 11 of FOISA

48. Under section 11 of FOISA, a person requesting information from a public authority has the right to express a preference for receiving it in a specified format and the authority must, so far as is reasonably practicable, provide the information in that format. Section 11(5) of FOISA states that such tests of reasonable practicability should not detract from any duty which a provider of services has under or by virtue of section 21 of the Disability Discrimination Act (DDA) 1995 (duty to make adjustments to practices, policies, procedures or physical features so that use of services by disabled persons is facilitated or made possible).
49. In her request for review (request 1) dated 6 November 2006 and initial request (request 2) dated 7 November 2006 Ms K requested that SCRA provide the information which SCRA held in relation to her information requests in Braille as she had difficulty reading written documents. SCRA provided some information to Ms K in response to request 1, but refused to provide her with any information in response to request 2 (and I have found that SCRA were entitled to do this). The information in response to request 1 included scanned versions of a document, which Ms K could not read.
50. Ms K wishes me to comment on whether a public authority has a duty under FOISA to provide information in Braille within the 20 day time limit permitted by section 10(1) of FOISA. While I do not consider it to be within my remit to comment on whether SCRA complied with the DDA in the manner in which it provided information in Braille to Ms K, it is within my remit to consider whether the provision of information in Braille was in line with FOISA.
51. SCRA has advised me that, following Ms K's request for information (made on 6 November 2006), it made enquiries within its offices to ascertain what (if any) translation services had been used by SCRA previously. No such translation services had been used previously. According to SCRA, it then spent a considerable time trying to locate a company to undertake the translation. It was a busy time (leading up to Christmas) and many companies were unable to provide an undertaking in relation to confidentiality, which SCRA considered was appropriate due to the sensitivity of the response. Finally, a company was located and time was then spent finalising a confidentiality agreement before the response could be translated.
52. In this case, it is clear that even if Ms K had included in her initial request a request that any information released to her should be in Braille, I would not have considered it reasonably practicable, for the reasons contained paragraph 51, for a Braille version of the information to have been provided to her within 20 working days. However, while that is the case here, it may well be the case that it will be reasonably practicable for information to be provided in Braille within the 20 working days set down by FOISA. I consider that it will all depend on the facts and circumstances of each case.



Decision

I find that the Scottish Children's Reporter Administration (SCRA) was entitled to refuse to provide Ms K with information in response to both of her information requests on the basis that the information is exempt in terms of section 38(1)(b) of the Freedom of Information (Scotland) Act 2002 (FOISA).

However, I find that SCRA failed to comply with certain technical aspects of her information requests, as detailed above, and that in doing so it failed to comply with sections 10, 16, 19, and 21 of FOISA. As stated above, I do not require SCRA to take any remedial action with regards to the technical failures.

Appeal

Should either Ms K or SCRA 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 the date of intimation of this decision notice.

Kevin Dunion
Scottish Information Commissioner
31 October 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

11 Means of providing information

- (1) Where, in requesting information from a Scottish public authority, the applicant expresses a preference for receiving it by any one or more of the means mentioned in subsection (2), the authority must, so far as is reasonably practicable, give effect to that preference.
- (2) The means are-
 - (a) the provision to the applicant, in permanent form or in another form acceptable to the applicant, of a copy of the information;
 - (b) such provision to the applicant of a digest or summary of the information; and
 - (c) the provision to the applicant of a reasonable opportunity to inspect a record containing the information.
- (3) In determining, for the purposes of subsection (1), what is reasonably practicable, the authority may have regard to all the circumstances, including cost; and where it determines that it is not reasonably practicable to give effect to the preference it must notify the applicant of the reasons for that determination.
- (4) Subject to subsection (1), information given in compliance with section 1(1) may be given by any means which are reasonable in the circumstances.
- (5) Such tests of reasonable practicability as are imposed by this section are not to be construed as detracting from any duty which a provider of services has under or by virtue of section 21 of the Disability Discrimination Act 1995 (c.50) (duty to make adjustments to practices, policies, procedures or physical features so that use of services by disabled persons is facilitated or made possible).



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.

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).

38 Personal information

- (1) Information is exempt information if it constitutes-
 - (a)
 - (b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;
 - (c)
- (2) The first condition is-
 - (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles; or
 - (ii)
- (3) The second condition is that, by virtue of any provision of Part IV of that Act, the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).
- (4)
- (5)



DATA PROTECTION ACT 1998

1 Basic interpretative provisions

- (1) In this Act, unless the context otherwise requires –

.....

“personal data” means data which relate to a living individual who can be identified-

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual

SCHEDULE 1 THE DATA PROTECTION PRINCIPLES

PART I THE PRINCIPLES

1. Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.

SCHEDULE 2

CONDITIONS RELEVANT FOR PURPOSES OF THE FIRST PRINCIPLE: PROCESSING OF ANY PERSONAL DATA

6. (1) The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.

DISABILITY DISCRIMINATION ACT 1995

21 Duty of providers of services to make adjustments

- (1) Where a provider of services has a practice, policy or procedure which makes it impossible or unreasonably difficult for disabled persons to make use of a service which he provides, or is prepared to provide, to other members of the public, it is his duty to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to change that practice, policy or procedure so that it no longer has that effect.