

Decision Notice 205/2021

Historical Sheriff Court Records

Applicant: the Applicant

Public authority: Keeper of the Records of Scotland

Case Ref: 202100883



Scottish Information
Commissioner

Summary

The Keeper was asked for information in historical Sheriff Court records. The Keeper's response, initially and on review, explained the ongoing restrictions on access to its search room facilities, but did not disclose any information. The Commissioner investigated and found that the Keeper had failed to carry out a review meeting the requirements of FOISA. He required the Keeper to do this.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) (Effect of exemptions); 16 (Refusal of request); 21(4) and (5) (Review by Scottish public authority); 22(1) to (5) (Special provisions relating to records transferred to Keeper)

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 29 June 2021, the Applicant made a request for information to the Keeper of the Records of Scotland (the Keeper). The information requested was that contained in 12 specified historical Sheriff Court records.
2. The Keeper responded on 1 July 2021, confirming the information was held but citing the exemption in section 25(1) of FOISA. (This exempts information from disclosure if a requester can reasonably obtain it other than by requesting it under section 1(1) of FOISA.) The Keeper informed the Applicant that the information was otherwise accessible to view by appointment. The Keeper gave an email address to make an appointment for the Historical Search Room, which had restricted access due to Covid.
3. Later that day, the Applicant wrote to the Keeper requesting a review of the decision. She indicated that she had been unable to get an appointment to visit the Historical Search Room and therefore did not believe section 25(1) applied.
4. The Keeper notified the Applicant of the outcome of his review on 20 July 2021. The Keeper accepted that section 25(1) did not apply in the circumstances, as it was not possible to provide her with any alternative immediate access to the information. The Keeper explained the limited access available to the Historical Search Room due to the pandemic, with priority given to academic researchers. The Keeper also explained that copying services were operating at restricted capacity, so copies of the records could not be provided.
5. The Applicant was informed current access arrangements would be reviewed in August 2021, with a view to extending on-site access to other groups. Extended access was likely to be available from September 2021. The Keeper indicated that further updates would be provided on her website.
6. On 21 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Keeper's review because she did not agree with the authority's reasons for withholding the information.

Investigation

7. 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.
8. On 4 August 2021, the Keeper was notified in writing that the Applicant had made a valid application. The case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Keeper was invited to comment on this application and to answer specific questions. These related to why the information had not been made available to the Applicant.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Keeper. He is satisfied that no matter of relevance has been overlooked.

Was information disclosed or otherwise dealt with under FOISA?

11. Initially, the Keeper told the Applicant that all of the information requested was reasonably accessible to her and that the exemption under section 25(1) of FOISA applied. It ceased to rely on this exemption after a review (20 July 2021) but no information was forthcoming at this time.
12. At that point, the Keeper acknowledged that it was not in a position to provide the Applicant with any alternative immediate access to the information she sought. Restrictions on access to its buildings and collections during the pandemic were also preventing responses to information requests (noting, in particular, that only essential staff could be on site at any time and that restricted copying capacity prevented the provision of copies of the records in question). The Keeper also explained the position in relation to the gradual reopening of access to its search rooms, which was still restricted to academic researchers at that time.
13. In his submissions to the Commissioner, the Keeper noted that there were around 70 requests for information in closed historical records "on hold". The Keeper noted that these requests fell to be handled under section 22 of FOISA (see Appendix 1) and explained again the difficulties in securing access to its buildings and the records stored in them. The Keeper also explained that the complexity in handling the request was added to by the need to have the Scottish Courts and Tribunals Service (the SCTS) records, in line with section 22.
14. A subsequent submission provided further explanation of the gradual reopening of its services, including confirmation that the Applicant had secured access to some of the records in question since the general reopening of the Historical Search Room (subject to booking) in September 2021. It noted that it had been providing the Applicant with ongoing advice and guidance on available services during the pandemic. It did not, however, have anything further to say on the Keeper's handling of the request under FOISA.

The Commissioner's conclusions

15. 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, by virtue of section 1(6) of FOISA, allow Scottish public authorities to

withhold information or charge a fee for it. At the time of the Keeper's review in this case, none of these qualifications appear to have been considered relevant by the Keeper.

16. Section 16(1) of FOISA requires that, where an authority holds information which is subject to a request under section 1(1) of FOISA, and which it intends to withhold under any exemption, the authority must give the applicant notice in writing to the effect that the information is held, and specify which exemption it considers applies to the information (with reasons). The rest of section 16 makes similar provision for refusing requests for other reasons permitted by Part 1 of FOISA (where the requested information is held by the public authority, as it clearly was – and is – here).
17. A review outcome under section 21(4) of FOISA would need to confirm any exemptions or other provisions considered applicable as reasons for refusing to provide information. Section 21(5) requires a Scottish public authority to give the applicant notice of its decision on review, with reasons.
18. Section 22 of FOISA sets out special provisions for records which have been transferred to the Keeper by another Scottish public authority. In particular, any decision making on the request will be for the transferring authority rather than the Keeper, although it will remain for the Keeper to respond to the applicant. In this case, although the Keeper highlighted the challenges of the request being subject to section 22, no indication was given that section 22 had actually been complied with in relation to the request.
19. All of these provisions remain in full force and effect, notwithstanding the ongoing pandemic.
20. In all the circumstances of this case, the Commissioner is not satisfied that the Keeper complied with section 21(4) and (5) of FOISA, by reaching and communicating a compliant review outcome. The review outcome withdrew the Keeper's claim to section 25(1) but clearly continued to refuse to comply with the request, with no reason given in terms of FOISA for this refusal.
21. The Commissioner therefore requires the Keeper to conduct a further review and, in respect of information not yet accessed by the Applicant (noting that some of the records in question have since been inspected in the Historical Search Room), either supply the Applicant with the information from these remaining records or provide the Applicant with competent reasons for not supplying the information in terms of Part 1 of FOISA. In conducting the review, the Commissioner would expect the Keeper to comply with the relevant provisions of section 22 of FOISA.

Decision

The Commissioner finds that the Keeper of the Records of Scotland (the Keeper) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner finds that the Keeper failed to comply with section 21(4) and (5) of FOISA, by failing to conduct a compliant review and communicate the outcome to the Applicant. The Commissioner now requires the Keeper to carry out a review (or secure the conduct of such a review, in terms of section 22(4) and (5) of FOISA) meeting the requirements of section 21(4) and notify the Applicant of the outcome (disclosing information or, as appropriate, providing reasons for not doing so) in terms of section 21(5).

The Commissioner requires the Keeper to do this by 31 January 2022.

Appeal

Should either the Applicant or the Keeper 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.

Enforcement

If the Keeper fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the Keeper has failed to comply. The Court has the right to inquire into the matter and may deal with the Keeper as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

16 December 2021

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.

...

- (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

...

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.

- (2) Where the authority's claim is made only by virtue of a provision of Part 2 which does not confer absolute exemption, the notice must state the authority's reason for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information.

- (3) The authority is not obliged to make a statement under subsection (1)(d) in so far as the statement would disclose information which would itself be exempt information.

- (4) A Scottish public authority which, in relation to a request for information, claims that section 12(1) applies must, within the time allowed by or by virtue of section 10 for complying with the request, give the applicant a notice which states that it so claims.

- (5) A Scottish public authority which, in relation to such a request, claims that section 14 applies must, within that time, give the applicant a notice which states that it so claims; except that the notice need not be given if—

- (a) the authority has, in relation to a previous identical or substantially similar such request, given the applicant a notice under this subsection; and

- (b) it would in all the circumstances be unreasonable to expect it to serve a further such notice in relation to the current request.
- (6) Subsections (1), (4) and (5) are subject to section 19.

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates—
 - (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

22 Special provisions relating to records transferred to Keeper

- (1) Subsections (2) to (5) apply to information which—
 - (a) is contained in a record transferred to the Keeper of the Records of Scotland by a Scottish public authority; and
 - (b) has not been designated by the authority as open information for the purposes of this section.
- (2) The Keeper must, as soon as practicable after receiving a request for information to which this subsection applies, send a copy of that request to the authority which transferred the information; and it is for the authority, instead of the Keeper, to come to a decision as to whether the information is exempt information by virtue of any provision of Part 2 and to determine any question then arising by virtue of paragraph (a) or (b) of section 2(1) as respects the information.
- (3) After receiving the copy, the authority must, within such time as will make it practicable for the Keeper to comply with section 10 as respects the request, inform the Keeper of the decision mentioned in subsection (2) and of any determination required by virtue of that decision.
- (4) The Keeper must, as soon as practicable after receiving a requirement for review in which the specification under section 20(3)(c)(ii) relates to a decision made by the authority by virtue of subsection (2), send a copy of that requirement to the authority; and it is for the authority, instead of the Keeper, to review the decision and to do anything which is to be done under section 21(4).
- (5) After receiving the requirement, the authority must, within such time as will make it practicable for the Keeper to comply with subsection (5) of section 21 as respects the

requirement, inform the Keeper of what it has done under subsection (4) of that section and provide a statement of its reasons for so doing; and it is that information and statement which the Keeper shall, in the notice in writing, give in so complying.

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