

# Decision Notice



Decision 269/2013 David Willson and the Scottish Public Services  
Ombudsman

Investigation of a complaint

Reference No: 201302246  
Decision Date: 26 November 2013

[www.itspublicknowledge.info](http://www.itspublicknowledge.info)

**Rosemary Agnew**  
Scottish Information Commissioner

Kinburn Castle  
Doubledykes Road  
St Andrews KY16 9DS  
Tel: 01334 464610



## Summary

On 6 August 2013, Mr Willson asked the Scottish Public Services Ombudsman (the SPSO) to provide the information it had used to reach certain conclusions in relation to a complaint it had investigated, and for correspondence with the Minister for Transport. The SPSO withheld all information under section 26(a) of FOISA, and upheld this decision after review. Mr Willson requested and received information which was his own personal data under the Data Protection Act 1998 (the DPA), but believed that some information had not been provided. He applied to the Commissioner for a decision on how his request had been dealt with under FOISA.

The Commissioner found that the information held by the SPSO in relation to Mr Willson's request was exempt from disclosure under section 26(a) of FOISA.

## Relevant statutory provisions

---

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 26(a) (Prohibitions on disclosure)

Scottish Public Services Ombudsman Act 2002 (the SPSO Act) section 19(1)

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

## Background

---

1. On 6 August 2013, Mr Willson asked the SPSO to provide the information it had used to reach certain conclusions in relation to a complaint he had raised, and for communications between the SPSO and the Minister for Transport (including the Minister's office and delegates) with regard to the SPSO's findings on his complaint.
2. The SPSO responded on 8 August 2013, and informed Mr Willson that, under the SPSO Act, information which it obtained in respect of a complaint could only be disclosed in certain circumstances. Releasing the information under FOISA was not one of those circumstances. The information was therefore exempt from disclosure under section 26(a) of FOISA.
3. The SPSO told Mr Willson that much of the information in his complaint file was his own personal data, and that he had a right to request this information under the DPA.



4. On 13 August 2013, Mr Willson asked the SPSO to review its decision. He pointed out that the information in question would have been obtained either from himself or from his correspondence with Transport Scotland.
5. Mr Willson made a separate subject access for his own personal data. The SPSO disclosed his personal data on 29 August 2013.
6. On 5 September 2013, the SPSO provided Mr Willson with its response to his request for a review under FOISA. It upheld the decision to withhold all information covered by his request under section 26(a) of FOISA, for the reasons previously put forward.
7. On 27 September 2013, Mr Willson informed the Commissioner that he was dissatisfied with the outcome of the SPSO's review and wished to apply to the Commissioner for a decision in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Mr Willson made a request for information to a Scottish public authority and applied to the Commissioner for a decision only after asking the authority to review its response to that request.

## Investigation

---

9. On 1 October 2013, the SPSO was notified in writing that an application had been received from Mr Willson and was asked to provide the Commissioner with the information withheld from him. The SPSO responded with the information requested and the case was then allocated to an investigating officer.
10. The investigating officer subsequently contacted the SPSO, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). The SPSO was asked to respond to specific questions about the information covered by the request and to explain why it was considered exempt from disclosure under FOISA.
11. The SPSO responded on 18 November 2013. It explained that, under the DPA, Mr Willson had been provided with all the information held on file about his complaint, including information not covered by his terms of his request of 6 August 2013. It confirmed that the information covered by Mr Willson's request of 6 August 2013 was considered to be exempt from disclosure under section 26(a) of FOISA.

## Commissioner's analysis and findings

---

12. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both Mr Willson and the SPSO. She is satisfied that no matter of relevance has been overlooked.



### Section 26(a) – Prohibitions on disclosure

13. Section 26(a) of FOISA states that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment. It is an absolute exemption, and therefore is not subject to the public interest test. In this case, the SPSO argued that such a prohibition was created by section 19 of the SPSO Act.
14. Section 19(1) of the SPSO Act provides that information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for a limited range of purposes specified elsewhere in that section. These purposes do not include disclosure of information under FOISA. (The full text can be found in the Appendix to this decision.)
15. The Commissioner accepts that section 19(1) of the SPSO Act creates a prohibition on the disclosure of information which engages section 26(a) of FOISA.
16. Section 19(1) is clear in providing that the prohibition on disclosure only relates to information "obtained" by the Ombudsman or any of his advisers in connection with a matter in respect of which a complaint or a request has been made. The SPSO has confirmed, and the Commissioner accepts, that all information covered by the terms of Mr Willson's request was obtained from Transport Scotland or from Mr Willson himself, for the investigation of Mr Willson's complaint. The Commissioner therefore accepts that the information covered by Mr Willson's request is exempt from disclosure under section 26(a) of FOISA.
17. In considering whether the exemption in section 26(a) applies, it is irrelevant whether the information obtained by the SPSO originated with Mr Willson: the only consideration is whether there is a statutory prohibition on its disclosure, and the Commissioner is satisfied that section 19(1) of the SPSO Act prohibits disclosure of information obtained from the SPSO for its investigations, regardless of the source.
18. For the purposes of this decision, it is also not relevant that the information has been provided to Mr Willson under the DPA. Disclosure under FOISA is disclosure into the public domain, but information disclosed in response to a subject access request under the DPA is available only to the data subject. The Commissioner must consider whether the information should have been disclosed under FOISA; in this case, she has found that the exemption in section 26(a) of FOISA was correctly applied.
19. The SPSO was asked whether it held any other relevant information, such as notes made by the complaint investigator, which might not have been "obtained" for the purpose of investigating Mr Willson's complaint, but which might show why certain conclusions had been reached by the SPSO in relation to that complaint.
20. The SPSO confirmed that all recorded information relating to the investigation of Mr Willson's complaint was contained in his complaint case file, which had been provided to him under the DPA. It did not hold any other information about the investigation of Mr Willson's complaint.



21. The Commissioner notes that Mr Willson does not accept that the information he has received under the DPA shows which submissions, or parts of submissions, the SPSO used as evidence for the conclusions to which Mr Willson referred in his information request. However, after investigation, the Commissioner accepts that the SPSO does not hold any information relating to Mr Willson's complaint, or its investigation, other than the case file which has been provided to him under the DPA. FOISA does not require a Scottish public authority to create information in order to respond to an information request.
22. The Commissioner has concluded that the SPSO was entitled to withhold all information covered by Mr Willson's request under section 26(a) of FOISA.

## DECISION

The Commissioner finds that the Scottish Public Services Ombudsman complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mr Willson.

## Appeal

---

Should either Mr Willson or the SPSO 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.

**Margaret Keyse**  
**Head of Enforcement**  
**26 November 2013**



## 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.

...

- (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 –

...

- (b) section 26;

...

##### 26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

- (a) is prohibited by or under an enactment;

...



## Scottish Public Services Ombudsman Act 2002

### 19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are—
  - (a) the purposes of—
    - (i) any consideration of the complaint or request (including any statement under section 11),
    - (ii) any investigation of the matter (including any report of such an investigation),
  - (b) the purposes of any proceedings for—
    - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
    - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
  - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
  - (d) the purposes of any proceedings under section 14.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of individuals (in particular or in general), the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health or safety of the particular individuals or, as the case may be, individuals in question.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must—
  - (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and



- (b) inform the person from whom the information was obtained of the disclosure.
- (4A) The duty under subsection (4)(a) to inform a person about the identity of a person to whom information has been disclosed does not apply where informing the former person is likely to constitute a threat to the health and safety of the latter person.
- (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.
- (6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to—
  - (a) any document or information specified in the notice, or
  - (b) any class of document or information so specified,that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.
- (7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.
- (8) Information obtained from -
  - (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36)
  - (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.
- (9) In relation to such information, subsection (2)(a) has effect as if—
  - (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
  - (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.



Decision 269/2013  
Mr David Willson and  
the Scottish Public Services Ombudsman



- (10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.