

Decision 074/2006 Mrs Susan Mackenzie and the Scottish Executive
<i>Request for personal information</i>

Applicant: Mrs Susan Mackenzie
Authority: Scottish Executive
Case No: 200600028
Decision Date: 15 May 2006

Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Decision 074/2006 – Mrs Susan Mackenzie and the Scottish Executive

Request for personal information – information provided under FOISA rather than DPA - content of certain notices under section 19 of the Act – failure to respond to the request for review within the 20 working day timescale set out in section 10(1) and section 21(1) of the Act

Facts

Mrs Mackenzie requested from the Scottish Executive (the Executive) all information held by it relating to herself, including internal email, memoranda and minutes.

The Executive provided this information, but did not conduct a review when requested by Mrs Mackenzie.

Outcome

The Commissioner found that the Executive failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to respond to Mrs Mackenzie's request for information within 20 working days as required by section 10(1) of FOISA.

The Commissioner found that the Executive failed to provide Mrs Mackenzie with information about her right to a review and her right to appeal to the Commissioner as required by section 19 of FOISA.

The Commissioner also found that the Executive failed to respond to Mrs Mackenzie's request for a review within the 20 working day timescale set out in section 21 of FOISA. However, the Commissioner was satisfied that steps had been taken by the Executive to improve procedures and no further action was required in response to these breaches.

The Commissioner found that the Executive failed to comply with Part 1 of FOISA by failing to issue a refusal notice in accordance with section 16(1) of FOISA in that it failed to specify that the information was exempt by virtue of section 38(1)(a).

The Commissioner found that the Executive has supplied Mrs Mackenzie with all of the information requested by her.

Appeal

Should either the Executive or Mrs Mackenzie 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 notice.

Background

1. On 7 October 2005, Mrs Mackenzie faxed a letter to the Executive, in which she asked the Executive to supply her with all the information it held relating to herself, including internal memoranda and any minutes of meetings. Mrs Mackenzie's letter was headed "Freedom of Information Act" and she asked the Executive to let her have information "under the ... Act".
2. The Executive replied by letter (10 October 2005) indicating that it was gathering the requested information and on 8 November 2005 sent Mrs Mackenzie her personal documentation. The Executive again sent (10 November 2005) additional ministerial correspondence that related to the applicant's request.
3. On 14 November 2005, Mrs Mackenzie wrote to the Executive asking it to review its decision, in particular asking for an attachment to one of the documents supplied, and questioning whether all the material requested had been provided.
4. In November 2005 (undated letter), the Executive sent the applicant a copy of the requested attachment. It explained that there were no internal memos, minutes or copies of e-mails and that an electronic system was used for ministerial correspondence with final versions being retained for reference.
5. On 21 November 2005, the Executive responded by stating that it had explained that it had provided all the information and did not intend to review the matter.
6. Mrs Mackenzie wrote on 23 November 2005 (and 18 December 2005) to the Executive explaining that she wished a review to be carried out under FOISA.
7. The Executive responded on 19 December 2005 confirming that all copies of documents had been provided and that it could not provide a review.

8. On 9 January 2006, Mrs Mackenzie applied to me for a decision as to whether the Executive had dealt with her information request in accordance with Part 1 of FOISA. She requested a review of the Executive's decision on the grounds that she believed that information covered by her request had not been provided, in particular communications with named Sheriffs, which she alleged must exist. The applicant also asked me to investigate the Executive's failure to conduct a review.
9. The case was allocated to an investigating officer.

The Investigation

10. Mrs Mackenzie's appeal was validated by establishing that she had made a valid information request to a Scottish public authority and had appealed to me only after asking the public authority to review its response to her request.
11. My investigating officer then contacted the Executive on 12 January 2006 for its comments on the application and for further information. The Executive responded on 10 February 2006, providing:
 - The information (40 documents) sent to Mrs Mackenzie on 8 November and 10 November 2005
 - Copies of correspondence with Mrs Mackenzie
 - A copy of the Executive 'Practical Guidance Notes'
 - A copy of an internal note found on further investigation which was subsequently supplied to Mrs Mackenzie
 - Drafts of two letters supplied to Mrs Mackenzie.
12. During the investigation, in addition to the internal note referred to above, the Executive also found two briefing memos for letters which the Executive had already disclosed to Mrs Mackenzie. The Executive did not regard these briefing memos as the personal data of Mrs Mackenzie. However, since these memos were about letters already provided to her, and would answer a point raised in her request for a review, the Executive agreed to disclose these memos to Mrs Mackenzie.

Submissions from the Executive

13. The Executive accepted that the initial request, and requirement for review, by Mrs Mackenzie had not been dealt with in accordance with FOISA, and it apologised for this. It stated that the request had not been dealt with in accordance with its own guidelines and that training had been put in place to ensure that this would not happen to any future requests.
14. Although dealt with under FOISA, Mrs Mackenzie's request would, the Executive stated, have been better dealt with as a subject access request under section 7 of the Data Protection Act 1998 (the DPA). As such, the information requested by Mrs Mackenzie should have been regarded as exempt under section 38(1)(a) of FOISA.
15. The Executive stated that as Mrs Mackenzie had corresponded with it over a number of years it was easy to locate the information she had requested and that all the information held on Mrs Mackenzie was supplied to her.
16. Mrs Mackenzie had asked how the Executive could state that it held no further information when some of the information supplied (ministerial responses to questions from her elected representative about two sheriffs) must have required, for example, correspondence with those sheriffs. The Executive explained that in addition to the search carried out by the Justice Department of its manual records, the electronic Ministerial correspondence system was also checked. With regard to whether there is any correspondence with either Sheriff in relation to Mrs Mackenzie, the search for this was carried out by the division in the Justice Department responsible for Judicial Appointments. This is the division which held the information in relation to the ministerial correspondence held in relation to Mrs Mackenzie. The Executive explained that if there had been any correspondence with Sheriffs in relation to Mrs Mackenzie this would have been held in the manual records which contained the ministerial correspondence. The Executive stated that no other areas in the Scottish Executive would hold such information. It explained that because there had been a long-running correspondence with Mrs Mackenzie on this issue, the ministerial responses had been drafted without having to approach anyone outwith the relevant Executive division.
17. In response to the question asked by Mrs Mackenzie, and put to the Executive by my Office, it stated that there were no internal memos, minutes of meetings or copies of email but instead an electronic system for ministerial correspondence where the final version was stored for future reference.

Submissions from the applicant

18. Mrs Mackenzie said that the Executive had not provided all the information requested. She quoted a ministerial statement in a letter to her elected representative which she claimed could not have been made without communication with the named Sheriffs, and since such information was not contained in the information she had received she questioned whether all of the information had been provided.
19. Mrs Mackenzie also expressed her dissatisfaction that the Executive had not conducted a review as she had twice requested.

The Commissioner's Analysis and Findings

20. Where an applicant makes a request for information held by a public authority that relates to the applicant, this will in most cases be a request for personal information which should be considered under the provisions of the DPA. Section 38(1)(a) of FOISA states that information is exempt information if it constitutes personal data of which the applicant is the data subject.
21. The term "personal data" is defined in section 1(1) of the DPA as:

"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."
22. Where a request is made to a public authority for personal information relating to the individual making the request, that request should be dealt with in line with the provisions of the DPA. As mentioned above, under section 38(1)(a) of FOISA, information is exempt if it constitutes personal data of which the applicant is the data subject. In other words, it is not possible for a person to obtain his or her own personal information under FOISA. This is because disclosure of information under FOISA is effectively disclosure to the world at large and the release by a public authority of an individual's personal information into the public domain without their consent would constitute a breach of their privacy rights.
23. Mrs Mackenzie's request to the Judicial Appointments & Finance Division constituted a subject access request. Given the fact that Mrs Mackenzie's letter was headed "Freedom of Information Act", the Executive should have supplied Mrs Mackenzie with a refusal notice, citing section 38(1)(a) of FOISA.

24. If it is clear, as in this case, that an applicant wishes to use FOISA to access personal information, the authority should make it clear to the applicant that any personal information provided has been provided under the terms of the DPA and not under FOISA. However, the request for information remains an information request under section 1 of FOISA and this means that the procedures set out in FOISA must be followed in dealing with the request.
25. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days from the receipt of the request to comply with the request for information. The Executive did not respond to Mrs Mackenzie's request for information within this timescale.
26. Section 21(1) of FOISA gives authorities a maximum of 20 working days from receipt of the requirement to comply with a requirement for review. The Executive failed to conduct a review in terms of FOISA of Mrs Mackenzie's request.
27. No information was provided to Mrs Mackenzie about her right of application to the Scottish Executive for a review of the procedure provided by the Scottish Executive for dealing with complaints about its handling of requests for information, as required by section 19 of FOISA. Section 19(b) of FOISA requires an authority to inform an applicant about their right to seek a review of the authority's response and their right to apply to me for a decision. The Executive has indicated that it is instituting training on this aspect as a matter of urgency. It was accepted by the Executive in the course of this investigation that it did not deal with Mrs Mackenzie's request in accordance with the procedures laid down in Part 1 of FOISA.
28. The Executive apologised that Mrs Mackenzie's request for review had not been dealt with in accordance with its procedures for dealing with FOISA requests. Having seen a copy of the Executive's FOI Practical Guidance Notes, I accept that the Executive has procedures which address the omission of these requisite procedures in the applicant's case.
29. Despite the fact that Mrs Mackenzie's request was not dealt with correctly, I am satisfied that Mrs Mackenzie has received all the information requested by her, albeit under FOISA rather than the DPA. Mrs Mackenzie's request was for personal information that related to her.

Decision

I find that the Scottish Executive failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) by failing to respond to Mrs

Mackenzie's request for information within 20 working days as required by section 10(1).

I find that the Executive failed to comply with Part 1 of FOISA by failing to issue a refusal notice in accordance with section 16(1) of FOISA in that it failed to specify that the information was exempt by virtue of section 38(1)(a).

I find that the Executive failed to comply with the requirements of Part 1 of FOISA in not advising Mrs Mackenzie of her rights to seek a review and apply to the Commissioner as required by section 19(b) of FOISA.

I also find that the Executive failed to respond to Mrs Mackenzie's request for a review within the 20 working day timescale set out in section 21 of FOISA.

However, I am satisfied that steps have been taken by the Executive to improve procedures and I require no further action in respect of this Decision Notice.

I am satisfied that the Executive has supplied Mrs Mackenzie with all her personal information.

Kevin Dunion
Scottish Information Commissioner
15 May 2006