

Decision Notice



Decision 207/2013 Mr and Mrs B and the Scottish Court Service

Sheriff Court case

Reference No: 201300350

Decision Date: 17 September 2013

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Rosemary Agnew

Scottish Information Commissioner

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Summary

On 27 October 2012, Mr and Mrs B (the Bs) made a request to the Scottish Court Service (SCS) for information concerning a court case at Kilmarnock Sheriff Court. The SCS informed the Bs that the information was exempt from disclosure. On 20 November 2012, the Bs submitted a further request for information to the SCS regarding the same court case and the SCS responded to it a few days later. Following a review of the SCS's responses to both requests, the Bs remained dissatisfied and applied to the Commissioner for a decision

After investigation, the Commissioner found that that the SCS was entitled to withhold all the information covered by the request of 27 October 2012 under section 37(1)(a)(i) and (iii) of FOISA. The Commissioner found that the SCS did not hold any information covered by the request of 20 November 2012, but had failed to give the Bs notice to this effect as required by section 17(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(d) (Effect of exemptions); 17(1) (Notice that information is not held); 37(1)(a)(i) and (iii) (Court records, etc.)

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. This decision relates to two requests submitted to the SCS for information about a specified case at Kilmarnock Sheriff Court.

Request 1

2. On 27 October 2012, the Bs made a request (request 1) for information about a specific case at Kilmarnock Sheriff Court, stating they wished to be provided with a complete court record, partial detailed notes of the "Sheriff's Court Judge", final judgement or conclusion, whatever might be available.



3. The SCS responded to request 1 on 31 October 2012. The SCS withheld all information covered by the request, as it considered that an exemption under section 37 of FOISA applied. It explained that court records are “documents, reports and minutes etc. that are used, obtained or produced in court for the purpose of court proceedings.”

Request 2

4. On 20 November 2012, the Bs submitted a further, related request (request 2) asking what “area of law” was debated or considered in the case, giving examples such as matrimonial, child law, family, debt recovery, conveyancing etc.”.
5. On 23 November 2012, the SCS responded that the information was exempt under section 37 of FOISA, as it was information contained in court records. Again, it explained what court records were.
6. The Bs wrote two letters dated 28 November and 3 December 2012 regarding their requests. In these letters, the Bs indicated that the details of the specified case could have been heard in public, by anyone attending Kilmarnock Sheriff Court on that day. In their view, the information they were requesting should not have been withheld from them. The Bs also argued that providing details of the exact branch of law would not breach FOISA.
7. On 18 December 2013, the SCS issued its review decision, upholding its application of section 37 to the withheld information and confirming its initial responses to both requests. It also provided further comments on its decision and gave further details of forthcoming hearings to the Bs, should they wish to attend as members of the public.
8. On 25 January 2013, the Bs wrote to the Commissioner, stating that they were dissatisfied with the outcome of the SCS’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that the Bs had made requests for information to a Scottish public authority and had applied to the Commissioner for a decision only after asking the authority to review its response to those requests

Investigation

10. The SCS was contacted by the investigating officer (on 15 March 2013) regarding the Bs’ application, giving the SCS an opportunity to provide comments (as required by section 49(3)(a) of FOISA) and asking the SCS to respond to specific questions. The SCS was asked to confirm what information was held in relation to the specified court case, and why it considered that the exemption in section 37 of FOISA applied to both requests. The SCS was also asked if it held any information which would give more detail on the branch of law involved (request 2).



Commissioner's analysis and findings

11. 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 the Bs and the SCS. She is satisfied that no matter of relevance has been overlooked.

Request 1

12. The SCS withheld information covered by request 1 under section 37 of FOISA. Section 37 ensures that existing procedures which govern access to information generated by or used in court (and other legal dispute resolution) proceedings are not overridden by FOISA. The exemption ensures that where authorities hold information solely because of their involvement in court proceedings, an inquiry or arbitration, they are not required to release it outwith those proceedings.
13. Specifically, section 37(1)(a) of FOISA states that information is exempt information if it is contained in a document:
- (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or member of its administrative staff for the purposes of, or in the course of, such proceedings.
14. Section 37(1) will only be engaged if the authority holds the information solely because it is contained in such a document. The Commissioner notes that, in essence, section 37(1) provides an absolute exemption (as it is not subject to the public interest test contained in section 2(1) of FOISA) in respect of all documents lodged with, or otherwise placed in the custody of, a court or created by a court (or its staff) for the purposes of court proceedings where the information is held by the authority solely because it is contained in such a document.
15. The SCS provided the Commissioner with a full list of the information covered by request 1. It stated that the information was exempt in terms of section 37(1)(a)(i) and (iii) of FOISA, as it was either lodged with, or created by, a court for the purposes of proceedings. To support this statement, the SCS cited rule 11.2 in the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993, which states that the initial writ, and all other parts of process lodged in a cause, shall be placed in the process folder which shall remain in the custody of the sheriff clerk.
16. In their application to the Commissioner, the Bs commented that the application of the exemption under section 37 of FOISA was unreasonable and had been applied unfairly. They questioned the validity of withholding the information under section 37, given that they could easily have attended the scheduled case hearing held in public in January 2013.



17. The Commissioner can understand the why the Bs would raise these arguments, which are based upon the premise that any information capable of being heard in court is equally capable of disclosure under FOISA. However, this premise is not the test which must be used when determining whether section 37 of FOISA might apply. Essentially, section 37(1) provides an absolute exemption in respect of all documents lodged with, or otherwise placed in the custody of a court or created by a court (or its staff) for the purposes of court proceedings where the information is held by the authority solely because it is contained in such a document. This is irrespective of whether or not the information is made known to the public in court.
18. In this case, the Commissioner is satisfied that all of the documents under consideration have either been lodged with the court in relation to proceedings which had commenced, or were created by members of court staff for the purposes of, and in the course of, relevant proceedings.
19. The Commissioner is also satisfied that the information is held by the SCS solely because it is contained in such documents.
20. Consequently, the Commissioner is satisfied that the information requested by the Bs in their first request is exempt from disclosure by virtue of section 37(1)(a) of FOISA. This is an absolute exemption which is not subject to the public interest test contained in section 2(1)(b) and so the Commissioner is not required to go on to consider whether the public interest in disclosing the information is outweighed by that in maintaining the exemption.
21. The Commissioner will now go on to consider the Bs' second request.

Request 2

22. As noted above, the Bs asked the SCS for information about the area or branch of law which was considered or debated in the specified court case.
23. In its initial response, the SCS cited section 37 of FOISA, but in its submissions to the Commissioner the SCS confirmed that there was no note of the matters of law discussed in the case. The SCS explained that any matters of law discussed in a case are for the solicitors acting to submit or consider during procedure, but the proceedings are not recorded, and clerks of the court are not always present for all parts of the process.
24. Section 73 of FOISA defines "information" as "information recorded in any form". Given this definition, it is clear that FOISA does not require a public authority to create recorded information in order to respond to a request, or to provide information which is not held in a recorded form.
25. The information to be given is that held by the authority at the time the request is received (section 1(4) of FOISA). If the authority does not hold any information covered by the request, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.



26. The Commissioner must therefore decide whether the SCS held any information covered by request 2 at the time of the B's request for review.
27. The Commissioner accepts the SCS's explanation that the court proceedings were not recorded and that there is no note of the discussions that took place. Consequently, the Commissioner concludes that information about the branch or area of law was not recorded, and that the SCS does not hold any information capable of addressing request 2. The Commissioner is concerned that the SCS failed to make this point clear from the outset when responding to request 2 and when issuing its review decision. The SCS had two opportunities to explain this clearly to the Bs during its handling of this request, and in failing to do so, it failed to comply with section 17(1) of FOISA.

DECISION

The Commissioner finds that the Scottish Court Service (the SCS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr and Mrs B.

The Commissioner finds that the SCS correctly applied the exemptions under section 37(1)(a)(i) and (iii) of FOISA to information falling within the scope of Mr and Mrs Bs' first request.

In respect of the Bs' second request, the SCS failed to provide notice that it did not hold the information which had been requested and so failed to comply with section 17(1) of FOISA. As the Commissioner accepts that the SCS does not hold any information covered by the second request, she does not require the SCS to take any action in relation to this failure.

Appeal

Should either Mr and Mrs B or the Scottish Court Service 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
17 September 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
- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

- (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 –

...

- (d) section 37; and

...

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.

...

37 Court records, etc.

(1) Information is exempt information if it is contained in-

(a) a document-

(i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter

...

(iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings;

...

and a Scottish public authority holds the information solely because it is contained in such a document.

...