



Scottish Information
Commissioner
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Decision Notice 111/2024

Historical Sheriff Court Records

Authority: Keeper of the Records of Scotland

Case Ref: 202200178

Summary

The Applicant asked the Authority for information in specified historical Sheriff Court records. In its original review response, the Authority did not disclose the records and did not rely upon any exemption to do so. In its revised review response, the Authority did not disclose the information requested on the basis that it was otherwise accessible to the Applicant. The Commissioner investigated and found that the Authority had failed to comply with FOISA in responding to the request.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 21(4) and (5) (Review by Scottish public authority); 22(1) to (5) (Special provisions relating to records transferred to Keeper); 25 (Information otherwise accessible); 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 29 June 2021, the Applicant made a request for information to the Authority for information contained in specified historical Sheriff Court records.
2. The Authority responded on 1 July 2021, confirming that 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 Authority informed the Applicant that the information was otherwise accessible to view by appointment. The Authority gave an email address to make an appointment for the Historical Search Room, which had restricted access due to COVID-19.

3. Later that day, the Applicant wrote to the Authority requesting a review of the decision. The Applicant indicated that she had been unable to get an appointment to visit the HSR and therefore did not consider section 25(1) of FOISA applied.
4. The Authority notified the Applicant of the outcome of its review on 20 July 2021. The Authority accepted that section 25(1) of FOISA did not apply in the circumstances, as it was not possible to provide her with any alternative immediate access to the information requested. The Authority explained that the limited access available to the Historical Search Room was due to the COVID-19 pandemic, with priority given to academic researchers. The Authority also explained that copying services were operating at restricted capacity, so copies of the records could not be provided.
5. On 21 July 2021, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. This resulted in the Commissioner issuing [Decision 205/2021](#)¹, which found that the Authority had failed to comply with section 21(4) and (5) of FOISA by failing to conduct a compliant review. It was required to conduct a review and to communicate the outcome to the Applicant.
6. The Commissioner required the Authority to carry out a review meeting the requirements of section 21(4) of FOISA and to notify the Applicant of the outcome in terms of section 21(5).
7. The Authority issued a revised review response to the Applicant on 18 January 2022, stating that it now considered the requested records were otherwise accessible in line with section 25(1) of FOISA.
8. On 10 February 2022, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated that she was dissatisfied with the outcome of the Authority's review because she had requested an appointment to view the outstanding records, but was refused and she therefore did not consider that section 25(1) of FOISA was applicable.

Investigation

9. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.
10. On 8 March 2022, the Authority was notified in writing that the Applicant had made a valid application and the case was subsequently allocated to an investigating officer.
11. On 21 May 2022, the Applicant confirmed that she had obtained access to all the records that she sought, but still required the Commissioner to issue a decision.
12. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Authority was invited to comment on this application and to answer specific questions. These related to the Authority's reliance on the exemption in section 25 of FOISA.

¹ <https://www.foi.scot/decision-2052021>

Commissioner's analysis and findings

13. The Commissioner has considered all of the submissions made to him by the Applicant and the Authority.

Section 21 of FOISA – Review by a Scottish public authority

14. As rehearsed earlier, the Commissioner, following the issue of Decision 205/2021, required the Authority to carry out a review meeting the requirements of section 21(4) of FOISA and to notify the Applicant of the outcome in terms of section 21(5).
15. On 18 January 2022, the Authority issued a revised review response to the Applicant stating that the information requested was otherwise accessible in line with section 25(1) of FOISA.
16. However, the Authority's revised review response of 18 January 2022 considered and answered the Applicant's request afresh in the circumstances of that time, rather than those in July 2021 (the date of its original review outcome).
17. The Authority considered that this approach was in line with paragraph 10.3.3 of [Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA](#)² (the Section 60 Code), which states:

"The aim of a review is to allow the authority to take a fresh look at its response to an information request, to confirm the decision (with or without modifications) or, if appropriate, to substitute a different decision. The review procedure must therefore be fair and impartial and allow decision makers to look at the request afresh. It should also enable different decisions to be taken. Review procedures should be sufficiently flexible to allow for differing circumstances such as the complexity and sensitivity of the information."

18. The Authority also submitted that its approach was in line with the Commissioner's view in [Decision 200/2014](#)³ (at paragraphs 23 and 37):

"[The Authority] had made "no attempt to consider whether that [harm] had in fact happened by the time they responded to [the Applicant's] requirement for review", and that "In relation to timing, the specific circumstances of the case do not appear to have been addressed..."

"[T]he Commissioner notes that (by the time [the Authority] carried out its review, at least) the establishment, in any form, had been closed for some time. By that time, then, it must have been difficult to argue that the incidents in question could reasonably be associated with any particular premises or their management."

The Commissioner's view

19. This is a relatively unusual case. It may well be appropriate for a Scottish public authority to take account of changed circumstances in carrying out a review, even a fresh review required by the Commissioner. Here, however, Decision 205/2021 was intended to address the authority's failure to conduct a proper review, **in the peculiar circumstances prevailing at that time**. At that time, while acknowledging that it was not entitled to apply section 25(1) of FOISA to the Applicant's request, the Authority failed to deal with the request in any other way that met the requirements of FOISA. Even during the pandemic, that was a latitude to which it was not entitled.

² [Code of Practice under section 60 of FOISA \(www.gov.scot\)](#)

³ <https://www.foi.scot/decision-2002014>

20. The Commissioner believes it should have been apparent that – even if it could confirm, with justification, that the information was by then accessible under conditions that allowed section 25(1) to apply – the Authority still needed to address its failure to meet the requirements of FOISA at that earlier point. Meeting those requirements may have been challenging for the Authority then, but the point was not a trivial one: with very limited qualifications, the requirements of FOISA still applied at the time and the Authority was still obliged to address them in dealing with any information request it received.
21. If the authority concluded, at the time of its original review, that section 25(1) could not be applied to the request, it was obliged to deal with the request in some other way that met the requirements of FOISA, either by providing the information or by applying another applicable provision of FOISA. It failed to do so. This was a matter that should have been addressed by the Authority in complying with Decision 205/2021. In failing to address that situation in the review required by that decision, the Authority failed to comply with section 21(5) of FOISA.

Section 25(1) of FOISA – Information otherwise accessible

22. Information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt from disclosure. This exemption is not subject to the public interest test in section 2(1)(b) of FOISA. Section 25(1) is not intended to prevent or inhibit access to information, but to relieve public authorities of the burden of providing information that an applicant can access readily without asking for it.
23. Sections 25(2) and (3) of FOISA set out the circumstances in which information:
 - (i) may be reasonably obtainable (section 25(2)(a)), and
 - (ii) is to be taken to be reasonably obtainable (section 25(2)(b) and (3)).
24. As rehearsed earlier, the Authority's revised review outcome should have considered the circumstances as at the date of the original review outcome (July 2021).
25. The Authority provided detailed submissions to the Commissioner on why it applied the exemption in section 25(1) of FOISA to the information requested, but these primarily relate to the circumstances after July 2021. The Commissioner will therefore not consider these submissions in any detail.
26. In its original review outcome, which did consider the circumstances in July 2021, the Authority accepted that the exemption in section 25(1) of FOISA did not apply, as it was not possible to provide the Applicant with any alternative immediate access to the information requested.
27. The Commissioner notes that the Authority's website, as at the date of the original request, made clear that the Historical Search Room reopened on 26 April 2021 on a limited basis to priority users only in line with Scottish Government guidance.

The Commissioner's view

28. Under section 25(1) of FOISA, information which an applicant can reasonably obtain other than by requesting it under section 1(1) of FOISA is exempt information. The exemption in section 25 is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.

29. The Authority alone has the benefit of section 25(2)(b)(ii) of FOISA, which states that information is to be taken as reasonably obtainable if the Authority holds it and makes it available for inspection.
30. In the Commissioner's view, section 25(2)(b)(ii) of FOISA grants the Authority considerable leeway in applying section 25(1). In other words, where the information is, as a matter of fact, available from the Authority for inspection (even subject to additional conditions governing access as a result of a public health emergency), then the Commissioner accepts that section 25(1) applies to that information.
31. That said, if the Authority concluded – on review – that section 25(1) could not be applied to the request, it was obliged to find another means of dealing with it which fulfilled the requirements of FOISA. That, as indicated above, it failed to do.
32. In this case, however, as the Applicant subsequently obtained the information requested from the Authority outwith FOISA, the Commissioner does not require the Authority to take any action in respect of its failures, in response to this application.

Other matters

33. Section 25(2)(b)(ii) of FOISA places considerable limits on the Commissioner's ability to regulate how the Authority makes information from public records available to the public. However, there might be exceptional circumstances in which the Commissioner could find that information from records simply was not being made available for inspection. Were that to happen, in the absence of specific legislative provision at the time, the Authority would have to be in a position to manage access to information under the general requirements applicable to Scottish public authorities when not charged with managing a public record.
34. During the investigation, the Commissioner asked the Authority to explain how it would respond to requests under FOISA, if a similar situation again arose where it was simply not possible for individuals to attend the Authority and view records.
35. The Commissioner accepts that the Authority has started the process of identifying how to mitigate such potential issues, but he is not persuaded, at this stage, that the measures set out are robust and would enable the Authority, if it found itself in such a situation again, to fully comply with FOISA.
36. The Commissioner will keep the situation under review and, if he has continuing concerns about the Authority's approach, it may be appropriate for him to take further action under his Intervention Procedures.

Decision

The Commissioner finds that the Authority 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.

Specifically, the Commissioner finds that the Authority failed to comply with Part 1 of FOISA by:

- not issuing a complaint revised review response in line with section 21(5) of FOISA
- failing to satisfy him that the information requested was otherwise accessible to the Applicant in line with section 21(5) of FOISA as at the date of the original review outcome.

Given that the Applicant has now obtained the information requested, the Commissioner does not require the Authority to take any action in respect of these failures, in response to the Applicant's application.

Appeal

Should either the Applicant or the Authority 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.

David Hamilton
Scottish Information Commissioner
19 November 2024