



Scottish Information
Commissioner
www.foi.scot

Decision Notice 018/2025

Definition of “mandatory” in relation to short term lets

Authority: Scottish Ministers

Case Ref: 202301577

Summary

The Applicant asked the Authority for its definition of the word “mandatory” in relation to the short term lets licensing scheme. During the investigation, the Authority informed the Applicant, in line with section 17(1) of FOISA, that it held no relevant, recorded information.

As part of his investigation, the Commissioner considered what information the Authority actually held. He concluded it did not hold the information requested by the Applicant.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (2) and (6) (General entitlement); 17(1) Notice that information is not held; 47(1) and (2) (Application for decision by Commissioner)

Background

1. On 27 October 2023, the Applicant made a request for information to the Authority. He referred to a [publication on short term lets](#)¹, and asked
 - (i) Can you confirm whether the word "mandatory" is used in a legal sense conforming to the legal definition of the word "mandate" and, if not, by which definition is the word "mandatory" used if not in a legal sense.
 - (ii) If so, please provide documentary evidence of the aforementioned legal mandate, conforming to the legal definition of that word, by which people with short-term lets must abide.
 - (iii) If there is no mandate, legally speaking, then by which legal mechanism are those "mandatory" conditions imposed?
 - (iv) While there appears to be a definition for the phrase "short-term let" there seems to no definition of the word "let" itself, therefore please provide the Scottish Government definition of the word "let" with respect to this subject.
 - (v) Please confirm whether or not money has to change hands (i.e. between host and guest) for temporary accommodation to be considered to be a "let" and specify which other methods of payment would be included for it to be categorised as such.
2. The Authority responded on 9 November 2023. It signposted the Applicant to the information he requested by providing web links to the relevant legislation and highlighting where the information could be found at those links.
3. On 11 November 2023, the Applicant wrote to the Authority requesting a review of its decision. The Applicant stated that he was dissatisfied with the decision because his request sought the definition of the word "mandatory" that the Authority was adhering to, and he did not believe that the response provided him with that information.
4. The Authority notified the Applicant of the outcome of its review on 7 December 2023. The Authority upheld its original response without modification and added that it was unable to provide him with legal advice on statutory interpretation. By way of advice, the Authority directed the Applicant to seek his own legal advice if he had questions around the meaning of the legislation.
5. On 9 December 2023, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the Authority's review because he believed that the Authority held a documented definition of the term "mandatory" and it had not been disclosed to him in response to his request.

Investigation

6. The Commissioner determined that the application complied with section 47(2) of FOISA and that he had the power to carry out an investigation.

¹ <https://www.gov.scot/publications/short-term-lets/>

7. On 21 February 2024, and in line with section 49(3)(a) of FOISA, the Commissioner gave the Authority notice in writing of the application and invited its comments.
8. During the investigation, the Authority changed its position. The Authority stated that, while it had previously applied section 25(1) of FOISA and signposted the Applicant to information, following the Applicant's clarification of what he was asking for (in his requirement for review), it now sought to rely on section 17(1) of FOISA, because it did not hold any information on the legal definition of "mandate" in relation to the short term lets licensing scheme.

Commissioner's analysis and findings

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

Does the Authority hold the information?

10. 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 public 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. The qualifications contained in section 1(6) are not applicable in this case.
11. The information to be given is that held by the Authority at the time the request is received, as defined by section 1(4). This is not necessarily to be equated with information that an applicant believes the public authority should hold. If no such information is held by the public authority, section 17(1) of FOISA requires the authority to give the applicant notice in writing to that effect.
12. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance of probabilities lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority.
13. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. While it may be relevant as part of this exercise to explore expectations about what information the authority should hold, ultimately the Commissioner's role is to determine what relevant recorded information is (or was, at the time the request was received) actually held by the public authority.

The Applicant's submissions on whether the information is held

14. The Applicant submitted that he struggled to believe that the Authority held no working definition of the word "mandate", nor any idea of whether there existed a mandate in alignment with a legal definition (or otherwise).
15. The Applicant commented that the Authority had a readily available working definition of "maladministration" when he had asked previously, and it gave a full and satisfactory response to him. He submitted that he struggled to believe that it did not have the same information for a word of even greater importance and impact on society.

16. The Applicant presented a hypothetical argument that, if he were to enter into correspondence with the Authority over any matter requiring a mandate (meaning that the matter was mandatory) and if he stated in that correspondence that he wished to use a particular dictionary definition of the term “mandatory”, it was possible that the Authority might not accord with the same definition. He considered, in these hypothetical circumstances, that the Authority would have to disclose to him its working definition of “mandatory”.
17. The Applicant noted that the information he asked for was not contained in the Interpretation and Legislative Reform (Scotland) Act 2010.

The Authority's submissions on whether the information is held

18. The Authority noted that it had referred the Applicant to [The Civic Government \(Scotland\) Act 1982 \(Licensing of Short-term Lets\) Order 2022²](#) (“the Order”), and to the policy note on the Order - [The Civic Government \(Scotland\) Act 1982 \(Licensing of Short-term Lets\) Order 2022³](#) in its response. It acknowledged that the information available at these web links did not define the terms “mandatory” and / or “mandate”.
19. The Authority submitted that Schedule 3 of the Order sets out the conditions which must be met for a host to obtain a licence in the context of a short term let and, although the legislation prescribed certain conditions as “mandatory” it did not specifically define the meaning of the word “mandatory”. The Authority argued that this was because the legislation does not offer a separate definition of every single word, phrase or term used within the statute, particularly where the meaning of a word would normally be understood by the reader. The Authority took the view that if a word is not defined in legislation, then under the normal approach to statutory interpretation the word takes its ordinary meaning assuming there is no ambiguity within the provisions of the legislation.
20. The Authority submitted that the Order established the licensing scheme for short terms lets and as part of that includes a list of conditions which must be met as part of that regulatory scheme. To the extent that these requirements were established as part of the Order, the Authority submitted that the conditions are mandatory as part of the scheme as a whole.
21. The Authority explained that it had carried out searches of its electronic records management system (eRDM) and it provided the Commissioner with full details of those searches, including the locations searched, the search terms used and the results of those searches. The Authority also submitted that it had asked its legal department to confirm whether it held any definitions on the word “mandate” in connection with short term lets.
22. The Authority submitted that to offer any view on whether the legislation itself was the mandate, or to provide advice on interpretation of all the relevant legislation would constitute giving legal advice to the Applicant, and that was not part of its role or duties under FOI.

The Commissioner's view on whether the information is held

23. The Commissioner has considered the submissions from the Applicant and the Authority carefully.

² <https://www.legislation.gov.uk/sdsi/2022/9780111052396>

³ https://www.legislation.gov.uk/ssi/2022/32/pdfs/ssipn_20220032_en.pdf

24. The Commissioner acknowledges the Applicant's concern that, in the absence of the Authority holding a working definition of the term "mandatory", there is an opportunity for that term to be misinterpreted. However, given the context of the request, relating to the regulatory requirements for short term let licensing, the Commissioner considers it highly unlikely that there could be any misinterpretation of the term "mandatory" when applied to the licensing conditions set out in the legislation. He notes that any misinterpretation that did arise would be a matter for the Court to determine.
25. Given the terms of the request, the Commissioner is satisfied that the searches carried out by the Authority were appropriate and, on balance, should have been able to identify information within scope of the request if it existed, and was held.
26. In all the circumstances of this case, the Commissioner is satisfied that the Authority does not hold recorded information which would fulfil the Applicant's request, and it was therefore entitled to rely on the exemption in section 17(1) of FOISA.
27. However, the Commissioner considers that the Authority should have given the Applicant notice under section 17(1) of FOISA, when responding to his requirement for review, that the information was not held. By failing to do so, he must find that the Authority failed to comply with section 17(1) of FOISA in this case.

Decision

The Commissioner finds that the Authority partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by the Applicant.

The Commissioner is satisfied that the Authority does not hold the information requested by the Applicant.

However, the Commissioner finds that by failing to issue a notice under section 17(1) of FOISA following the Applicant's requirement for review, the Authority failed to comply with Part 1 of FOISA.

Given that the Authority has since given the Applicant notice, under section 17(1) of FOISA, that the information is not held, the Commissioner does not require the Authority to take any action in respect of this failure.

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.

Jennifer Ross
Deputy Head of Enforcement

27 January 2025