

Decision Notice



Decision 054/2014 Company X and Social Care and Social Work
Improvement Scotland

Information relating to a complaint

Reference No: 201300621
Decision Date: 4 March 2014

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Rosemary Agnew
Scottish Information Commissioner

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Summary

On 7 November 2012, Company X asked Social Care and Social Work Improvement Scotland (SCSWIS) for information relating to a complaint made about company X. SCSWIS disclosed a summary of the complaint but withheld the remainder of the requested information on the basis that it was exempt under the FOISA. The applicant was also dissatisfied with the time taken by SCSWIS at initial request and review stages.

Following an investigation, the Commissioner found that SCSWIS was entitled to withhold the remaining information which the applicant had requested on the basis that disclosure would substantially prejudice the exercise of its statutory functions in relation to the regulation of care providers (section 35(1)(g) of FOISA). However, she also found that SCSWIS had breached the statutory timescales set out in sections 10(1) and 21(1) of FOISA.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 8(1) (Requesting information); 10(1) (Time for compliance); 21(1) (Review by Scottish public authority); 35(1)(g), (2)(a),(b),(c) and (d)(ii) (Law enforcement)

Public Services Reform (Scotland) Act 2010 sections 45(1) and (2) (General principles); 53(1), (2)(a),(d) and (e) and (5) (Inspections); 58 (regulations: inspections); 79(1) and (2) (Complaints about care services)

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.

Scottish Ministers' Code of Practice on the discharge of functions by Scottish public authorities under FOISA and the Environmental Information (Scotland) Regulations 2004 (the Section 60 Code)



Background

1. On 7 November 2012, Company X, a provider of facilities management and home care services, wrote to SCSWIS requesting the following information in relation to a complaint made about one of its employees:
 - 1) a copy of the original complaint
 - 2) all statements made
 - 3) medical evidence used by SCSWIS to reach its findings
 - 4) all investigation reports
 - 5) the minute or note of a meeting between SCSWIS and the employee complained against
 - 6) all documents in SCSWIS's file in relation to the complaint
2. SCSWIS responded on 14 December 2012, but withheld all of the information Company X had asked for under the exemptions in section 35(1)(g) (Law enforcement) and section 38(1)(b) (Personal information) of FOISA.
3. Company X wrote to SCSWIS on 21 December 2012, requesting a review of its decision. Company X questioned the application of the exemption in section 35(1)(g) to all of the information it had requested. Company X also queried what was personal data for the purposes of section 1(1) of the Data Protection Act 1998 and complained at the length of time SCSWIS took in its responses.
4. SCSWIS notified Company X of the outcome of its review on 29 January 2013. It upheld its previous decision with one modification: SCSWIS indicated that it was happy to disclose a redacted copy of the complaint resolution letter. (SCSWIS subsequently disclosed the document on 6 February 2013. This summarised the details of the complaint, the method of investigation, the conclusion and expected action.)
5. On 28 February 2013, Company X wrote to the Commissioner, stating that it was dissatisfied with the outcome of Company X's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
6. The application was validated by establishing that Company X 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

7. On 20 March 2013, SCSWIS was notified in writing that an application had been received from Company X and was asked to provide the Commissioner with the information withheld from Company X. SCSWIS responded with the information requested and the case was then allocated to an investigating officer.
8. The investigating officer subsequently contacted SCSWIS, giving it an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking it to respond to specific questions.
9. SCSWIS provided submissions to the investigating officer. SCSWIS relied on section 35(1)(g) of FOISA as read with sections 35(2)(a), (b), (c) and (d)(ii) (Law enforcement) of FOISA. It also cited section 38(1)(b) to all of the withheld information, which it considered to be personal data, in conjunction with section 38(2)(a)(i) of FOISA.

Commissioner's analysis and findings

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

Section 35(1)(g)- Law enforcement

11. SCSWIS submitted that the information withheld from Company X was exempt from disclosure in terms of section 35(1)(g) of FOISA.
12. Under section 35(1)(g) of FOISA, information is exempt information if its disclosure under FOISA would, or would be likely to, prejudice substantially the exercise by any Scottish public authority (as defined by FOISA) of its functions for any of the purposes listed in section 35(2) of FOISA. SCSWIS argued that disclosure of the information requested would, or would be likely to, prejudice substantially the exercise of SCSWIS's functions for four of the purposes specified in section 35(2), i.e. to ascertain:
 - whether a person has failed to comply with the law (section 35(2)(a));
 - whether a person is responsible for conduct which is improper (section 35(2)(b));
 - whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise (section 35(2)(c));
 - a person's fitness or competence in relation to any profession or other activity which the person is, or seeks to become, authorised to carry on (section 35(2)(d)(ii)).
13. SCSWIS is a Scottish public authority for the purposes of FOISA.



14. The exemptions in section 35 are all qualified exemptions, in that they are subject to the public interest test set out in section 2(1)(b) of FOISA. In addition, the exemptions can only apply where substantial prejudice would, or would be likely to, occur as a result of the disclosure of the information. There is no definition in FOISA of what is deemed to be substantial prejudice, but the Commissioner's view is that the harm in question must be of real and demonstrable significance. The authority must also be able to satisfy the Commissioner that the harm would, or would be likely to, occur and therefore needs to establish a real risk or likelihood of actual harm occurring as a consequence of disclosure at some time in the near (certainly the foreseeable) future, not simply that the harm is a remote possibility.
15. The Commissioner must therefore consider three separate matters in order to determine whether this exemption applies:
- does SCSWIS have a function in relation to one or more of the purposes mentioned in section 35(2)?
 - if it does, would disclosure of the information prejudice substantially, or be likely to prejudice substantially, SCSWIS's ability to exercise one or more of these function(s)?
 - if such prejudice would, or would be likely to, occur, whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosure of the information. (Unless she finds that it does, the Commissioner must order SCSWIS to disclose the information.)

The functions of SCSWIS

16. During the investigation, SCSWIS was asked for clarification on its functions and specifically from which parts of the Public Services Reform (Scotland) Act 2010 (the PSR) its powers are derived. SCSWIS directed the investigating officer to sections 53, 58 and 79 of the PSR (the relevant parts of these sections are set out in the Appendix). These sections of the PSR cover inspections by SCSWIS and complaints to SCSWIS about care services.
17. The Commissioner is satisfied that the purposes described in section 35(2)(a),(b),(c) and (d)(ii) of FOISA are functions of SCSWIS which arise by virtue of the PSR. She is satisfied that SCSWIS, by virtue of the PRS, has the statutory functions to protect and promote the welfare of those individuals relying on regulated care services such as the service being provided by Company X, including powers to investigate complaints of the kind to which Company X's information request relates.

Would substantial prejudice occur, or be likely to occur?

18. The Commissioner must now consider whether disclosure of the information would, or would be likely to, prejudice substantially the exercise of SCSWIS's functions for the purposes listed at section 35(2)(a),(b),(c) or (d)(ii).
19. In its application to the Commissioner, Company X queried whether substantial harm would, or would be likely to, be caused to SCSWIS's functions by disclosure of the withheld information. Company X also questioned whether every item of information stipulated in its request was truly exempt under section 35.



20. SCSWIS submitted that the information falling within the scope of parts 1 to 5 (and therefore, by default, also falling within the scope of part 6) of Company X's request constitutes the necessary evidence gathered to undertake its prescribed law enforcement functions. SCSWIS did not consider it possible to break up the bundle of individual items Company X had requested in order to disclose parts of the information Company X was requesting. SCSWIS asserted that doing so would result in the same level of substantial prejudice to its functions as full disclosure.
21. SCSWIS explained its general reliance upon whistle-blowers and members of the public when carrying out its statutory functions. SCSWIS commented that individuals would be, or would be likely to be, dissuaded from co-operating with SCSWIS investigations in future if they thought their evidence, which was considered to be provided in confidence, would find its way into the public domain by means of any future information requests being responded to under FOISA. SCSWIS was concerned that it would become known "as a regulator which might publicly identify complainants." SCSWIS commented on the significant distress this would cause for the families complaining about care services which in turn would lead to wider public upset in the lack of confidentiality for those confiding in SCSWIS.
22. Further to these arguments, SCSWIS contended that it would not be able to fulfil its statutory inspection functions as it was reliant on third parties confiding in it. In the absence of this intelligence, SCSWIS asserted it would be left unaware of serious welfare concerns requiring regulatory action. It argued that this would then endanger the welfare of all those relying on regulated care services.
23. Moreover, in this case, SCSWIS considered that establishing the harm caused to a care service user by a member of staff is invariably a sensitive matter involving material which is neither trivial nor appropriate for the general public, yet it is essential for any investigation into an allegation of harm. Testimony is required to corroborate allegations, without which SCSWIS would be unable to obtain invaluable information voluntarily. SCSWIS stated that its findings are transparent and always evidence based; the findings and reasoning it uses are provided in its resolution letter to the person complained against and to the complainant but it stated that the tangible evidence gathered, in itself, is not disclosed to the world at large.
24. With regard to the specific information here, SCSWIS emphasised that its focus was in establishing whether harm had been caused to a vulnerable adult, as well as considering any wider welfare concerns involved. It argued that the material in this case is "more than trivial"; much of the information collected here related to an allegation of harm, and was considered inappropriate for disclosure into the public domain (which would be the effect if the information were to be disclosed under FOISA), given the distress that would be caused to both the complainant and the family in this instance.



25. SCSWIS also commented that most complainants do not seek to have their grievances publicised in detail, arguing that, if information of this nature were released, their reputation as a “trusted confidant” would be damaged. This in turn would undermine its effectiveness as a regulator. SCSWIS gave as an example its reliance on testimony to corroborate allegations. It asserted that disclosure of information in this case would mean that future investigations would be unable to obtain this invaluable information voluntarily which in turn would compromise its ability to undertake its functions.
26. For all the reasons set out above, SCSWIS concluded that the disclosure of the requested information (or parts thereof) would prejudice substantially its ability to exercise its statutory functions in future.
27. The Commissioner can understand Company X’s interest in the complaint and why this might lead it to ask for more detail from SCSWIS. That said, the Commissioner accepts that public authorities such as SCSWIS must have the confidence of individuals and organisations when conducting inquiries which, by the nature of their functions, relate to matters of public trust. She is mindful that disclosure of the information under FOISA would result in the information being placed in the public domain. She also notes SCSWIS’s arguments regarding the effects of some of the withheld information being published, given its focus and given the difficulties when conducting investigations if public trust, and the confidence of individuals, were lost. Should individuals, employees or their employers or other organisations providing evidence believe that information they provide for such inquiries will routinely be made public, without the protection afforded by relevant criminal or civil proceedings, then the Commissioner accepts that it is likely that such confidence would be undermined.
28. The Commissioner is satisfied, in the circumstances, that disclosure of the information requested in this case would make it much less likely that future potential witnesses and other information sources would be willing to provide information about such matters, to the substantial prejudice of SCSWIS’s ability to protect the welfare of vulnerable adults.
29. Having considered all the relevant submissions and the information withheld in this case, the Commissioner is satisfied that disclosure of the requested information would have prejudiced substantially, or would have been likely to prejudice substantially, the exercise by SCSWIS of its functions for the purposes listed in section 35(2)(a)(b)(c) and (d)(ii) of FOISA, and consequently that SCSWIS was correct in considering the information to be exempt in terms of section 35(1)(g) of FOISA.

The public interest test

30. As noted above, the exemption in section 35(1)(g) is subject to the public interest test contained in section 2(1)(b) of FOISA. This means that, although the Commissioner has accepted that the information is exempt from disclosure under section 35(1)(g) of FOISA, she must still order the information to be disclosed unless she is satisfied, in all the circumstances of the case, that the public interest in maintaining the exemption outweighs that in disclosing the information.



31. SCSWIS acknowledged that there is a public interest in disclosing information where withholding information might cover up serious wrongdoing or incompetence, and where it would lead to the public being misled on, or would unjustifiably inhibit public scrutiny of, a matter of genuine public concern. SCSWIS also made it clear that it did not consider that to be the case here.
32. SCSWIS also recognised a public interest in its actions being scrutinised, but argued that that was not an issue here, given that its findings had already been made available to Company X by way of the resolution letter (dated 6 February 2013) as this letter constituted the conclusion to its investigation and also provided the reasoning for its findings.
33. SCSWIS also made reference in its submissions to its dedicated appeal procedure should a care service, such as Company X, wish to contest the findings. It argued that such a process makes provision for the required level of scrutiny. Company X contended that the appeal procedure to which SCSWIS is referring was not an option in this particular case as the complaint in question pre-dated the relevant cut-off date stipulated in the appeals process. The investigating officer clarified this point with SCSWIS. SCSWIS acknowledged during the investigation that Company X did not have a way, other than FOISA, of accessing the information in question in this particular case.
34. In its letter to SCSWIS dated 21 December 2013, Company X set out why it believed that disclosure was in the public interest. It argued that disclosing information about SCSWIS's processes and decisions would improve levels of public scrutiny, transparency and debate. It also argued that disclosure would allow SCSWIS, as regulator, to demonstrate that it had discharged its functions correctly and fairly in this case.
35. The Commissioner recognises that there is a general public interest in improving transparency and accountability in Scottish public authorities. Although an appeals process has now been established by SCSWIS, this process is not an option here. SCSWIS has disclosed to Company X an anonymised Summary of Complaint which sets out in brief the details of the complaint, the method of investigation and the conclusions it reached based on the investigations it undertook. Although Company X clearly would like more detail than this summary can provide (as borne out by the way it framed its request), the Commissioner considers that this disclosure provides a reasonable degree of transparency and accountability in this case in terms of the general public interest.
36. The Commissioner is mindful of Company X's argument that it is in the public interest for SCSWIS to demonstrate that it acts fairly and correctly. Company X clearly has a vested interest in understanding how SCSWIS came to its conclusions in this case because of the potential impact on its future interests and reputation as a care provider. However, the Commissioner also recognises why it is difficult for SCSWIS to release any further information given the nature of the material and the sources of evidence involved. Given the circumstances, on balance, the Commissioner considers that SCSWIS recognised the public interest in it dealing fairly and correctly with Company X (as evidenced by the disclosure to Company X of the summary of complaint).



37. The Commissioner also believes there to be a strong public interest in maintaining the exemption in section 35(1)(g) in this case in order to maintain the effectiveness of SCSWIS's investigative processes. In the circumstances, she considers there would need to be a compelling public interest in disclosure to outweigh that in maintaining the exemption. SCSWIS plays a very important role, investigating concerns about the treatment of some of the most vulnerable people in society. The Commissioner is satisfied that disclosure of the information in this case would be likely to make individuals less willing to make complaints to SCSWIS, for fear that the fact and circumstances of the complaint would be made public. This is relevant, given that, under section 45 of the PSR, SCSWIS must exercise its functions in line with the principle that the safety and wellbeing of all persons who use, or are eligible to use, any social service are to be protected and enhanced.
38. In all the circumstances, the Commissioner is satisfied that the public interest in the exemption being maintained outweighs that in disclosure. Consequently, she finds that SCSWIS was correct to withhold the information under section 35(1)(g) of FOISA.
39. Given that the Commissioner has concluded that all of the information is exempt from disclosure under section 35(1)(g) of FOISA, she is not required to, and will not, go on to consider the exemption in section 38(1)(b) of FOISA.

Technical issues

40. In its application, Company X also complained that SCSWIS had failed to respond to its request and requirement for review within the timescales set down by FOISA.
41. Section 10(1) of FOISA gives Scottish public authorities a maximum of 20 working days after receipt of the request to comply with a request for information. Company X made an information request on 7 November 2012. SCSWIS responded on 14 December 2012.
42. During the investigation, SCSWIS was asked to clarify points regarding its handling of the initial request. SCSWIS confirmed that it had telephoned Company X on 27 November 2012 to verify that the solicitor who had written to SCSWIS was acting on behalf of Company X. The solicitor provided a mandate dated 28 November 2012 confirming that she was acting on behalf of Company X.
43. The Scottish Ministers' Code of Practice on the Discharge of Functions by Scottish Public Authorities under the Freedom of Information (Scotland) Act 2002 and the Environmental Information (Scotland) Regulations 2004 (at 1.7):

"..if the authority has reason to believe that the request is being made on behalf of another person (e.g. through previous knowledge/experience of dealing with the requestor, or the subject matter of the request), it should seek clarification on this as soon as reasonably practicable. It is important to note that if it transpires that the request is not being made on behalf of another person, it must be answered within the appropriate statutory period, calculated from the date the request was received (not from the date this clarification was provided)".



44. The Commissioner notes that SCSWIS explained that the purpose of the call was to verify that the solicitor was acting on behalf of Company X. SCSWIS confirmed that it added an additional 20 working days from the date it received the mandate from the solicitor.
45. Section 8(1)(b) of FOISA requires requesters to state the name of Company X and an address for correspondence. The Commissioner considers that the initial request meets these requirements. The solicitor in question stated clearly her own name, then gave the name of Company X explaining that she was acting on behalf of Company X as their legal representative. She also gave an address for correspondence. Whilst the Commissioner can understand why authorities might seek mandates in such cases to assure themselves who they are responding to and why, in terms of the FOISA process, SCSWIS need not have clarified the request in this way. It was clear in the initial request that Company X was Company X and that the solicitor was acting on its behalf. On this occasion, the initial request was valid in terms of section 8 of FOISA. For this reason, SCSWIS was not entitled to add a further 20 days onto the timescales for responding.
46. The Commissioner therefore finds that SCSWIS failed to comply with section 10(1) of FOISA when responding to the initial request from Company X.
47. Section 21(1) of FOISA requires public authorities to respond to requests for review within 20 working days of following the date of receipt of the request (subject to provisions which are not relevant here).
48. Company X wrote on 21 December 2012 to SCSWIS seeking a review. SCSWIS indicated to the investigating officer that it received this letter on 27 December 2012. SCSWIS issued its review response one day late on 29 January 2013.
49. The Commissioner therefore finds that SCSWIS failed to comply with section 21(1) in responding to Company X's request for review.

DECISION

The Commissioner finds that Social Care and Social Work Improvement Scotland (SCSWIS) partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Company X.

While the Commissioner finds that SCSWIS was entitled to refuse to disclose the information requested by Company X, she also finds that SCSWIS failed to comply with sections 10(1) and 21(1) of FOISA (timescales). She does not require SCSWIS to take any action in relation to these failings.



Appeal

Should either Company X or SCSWIS 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.

Margaret Keyse
Head of Enforcement
4 March 2014



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

- (b) states the name of Company X and an address for correspondence; and

- (c) describes the information requested.

...



10 Time for compliance

- (1) Subject to subsections (2) and (3), a Scottish public authority receiving a request which requires it to comply with section 1(1) must comply promptly; and in any event by not later than the twentieth working day after –
- (a) in a case other than that mentioned in paragraph (b), the receipt by the authority of the request; or
 - (b) in a case where section 1(3) applies, the receipt by it of the further information.

...

21 Review by Scottish public authority

- (1) Subject to subsection (2), a Scottish public authority receiving a requirement for review must (unless that requirement is withdrawn or is as mentioned in subsection (8)) comply promptly; and in any event by not later than the twentieth working day after receipt by it of the requirement.

...

35 Law enforcement

- (1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice substantially-

...

- (g) the exercise by any public authority (within the meaning of the Freedom of Information Act 2000 (c.36)) or Scottish public authority of its functions for any of the purposes mentioned in subsection (2);

...

- (2) The purposes are-

- (a) to ascertain whether a person has failed to comply with the law;
- (b) to ascertain whether a person is responsible for conduct which is improper;
- (c) to ascertain whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise;
- (d) to ascertain a person's fitness or competence in relation to-

...



- (ii) any profession or other activity which the person is, or seeks to become, authorised to carry on;

...

Public Services Reform (Scotland) Act 2010

45 General principles

- (1) SCSWIS must exercise its functions in accordance with the principles set out in the following subsections.
- (2) The safety and wellbeing of all persons who use, or are eligible to use, any social service are to be protected and enhanced

...

53 Inspections

- (1) SCSWIS may inspect-
 - (a) any social service,
 - (b) the organisation or co-ordination of any social services.
- (2) The purposes of an inspection under this section may include-
 - (a) reviewing and evaluating the effectiveness of the provision of the services which are the subject of the inspection,

...

- (d) investigating any incident, event or cause for concern,
- (e) in the case of care services, enabling consideration as to the need for-
 - (i) an improvement notice under section 62,
 - (ii) a condition notice under section 66 or a local authority condition notice under section 85.

...

- (5) An inspection under this section may, subject to any regulations made under section 58, take such form as SCSWIS considers appropriate.

...



58 Regulations: inspections

- (1) Regulations may make further provision concerning inspection under this Part.
- (2) Regulations under subsection (1) may, in particular, make provision—
 - (a) as to types of inspection which may be conducted,
 - (b) as to timing and frequency of inspections,
 - (c) as to seizure and removal of anything found during the course of an inspection,
 - (d) as to persons who may be authorised to carry out inspections,
 - (e) requiring or facilitating the sharing or production of information (including health records) for the purposes of an inspection under this Part,
 - (f) as to interviews and examinations (including physical and mental examinations) which may be carried out in connection with the inspections,
 - (g) requiring any person to provide to an authorised person an explanation of information produced to an authorised person.
 - (h) requiring information produced to an authorised person to be held in compliance with prescribed conditions and further disclosures to be made in compliance with such conditions,
 - (i) empowering an authorised person to disclose to a person prescribed for the purposes of this paragraph any information of a prescribed nature which the authorised person holds in consequence of such an inspection,
 - (j) creating offences punishable on summary conviction by a fine not exceeding level 4 on the standard scale for the purpose of enforcing any provision of the regulations.
- (3) In subsection (2), “prescribed” means prescribed by regulations under subsection (1).

79 Complaints about care services

- (1) SCSWIS must establish a procedure by which a person, or someone acting on a person’s behalf, may make complaints (or other representations) in relation to the provision to the person of a care service or about the provision of a care service generally.
- (2) The procedure must provide for it to be available whether or not procedures established by the provider of the service for making complaints (or other representations) about



that service have been or are being pursued.

...