

Decision Notice



Decision 103/2011 Mr Doug Tait and Transport Scotland

Government advisor's notes

Reference No: 201100288
Decision Date: 26 May 2011

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Kevin Dunion
Scottish Information Commissioner

Kinburn Castle
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Summary

Mr Doug Tait requested from Transport Scotland information pertaining to the legal case which supported the statements and opinion given by a Government advisor during a Committee hearing. Transport Scotland advised Mr Tait that the requested information was available online and therefore exempt under section 25 of the Freedom of Information (Scotland) Act 2002 (FOISA). Following a review, in which Transport Scotland advised that no further information was held, Mr Tait remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that Transport Scotland had dealt with Mr Tait's request for information in accordance with Part 1 of FOISA, by notifying Mr Tait in terms of section 17(1) that the information he had requested was not held. He did not require Transport Scotland to take any action.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement) and 17(1) (Notice that information is not held)

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. On 14 June 2010, Mr Tait emailed Transport Scotland requesting information relating to evidence given to the Forth Crossing Bill Committee (the Committee). He noted that a Government advisor had made references to the judgement *Tesco Stores Ltd v Secretary of State for the Environment (HL) [1995] 1 WLR 759* (the judgement) in their evidence to the Committee. He requesting the following information:

Relevant details of the legal case which support the statements and opinion made by a Government advisor during the evidence proceedings of the Forth Crossing Bills Committee and subsequently referred to in the Forth Crossing Bills Committee 1st Report, 2010 (Session 3).



2. Transport Scotland responded on 12 July 2010, advising Mr Tait that the judgement was already in the public domain and so was exempt from disclosure under section 25(1) of FOISA.
3. On 9 August 2010, Mr Tait wrote to Transport Scotland requesting a review of its decision. In particular, Mr Tait commented that he had already held a copy of judgement. He noted that he was seeking the specific details which the Government advisor believed supported her statement and opinion given to the Committee.
4. Transport Scotland notified Mr Tait of the outcome of its review on 31 August 2010. It informed Mr Tait that, in preparation for the Committee hearing, the Government advisor had researched other legal cases and had prepared a hand written note, which was destroyed after the hearing, as the transcript of the Committee hearing available online provides an accurate record of the evidence given.
5. It went on to notify Mr Tait that it did not hold any written record of the Government advisor's interpretation of the judgement.
6. On 13 February 2011, Mr Tait wrote to the Commissioner, stating that he was dissatisfied with the outcome of Transport Scotland's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mr Tait had made a request 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 that request. The case was then allocated to an investigating officer.

Investigation

8. Transport Scotland is an agency of the Scottish Ministers (the Ministers) and, in line with agreed procedures, the Ministers were notified in writing on 17 March 2011 that an application had been received from Mr Tait and that an investigation into the matter had commenced.
9. The Ministers were also given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions.
10. The Ministers responded on 8 April 2011, providing comments on the case and maintaining that they held no information that fell within the scope of Mr Tait's request. The Ministers also provided supporting information regarding the searches undertaken, comments received from the Government advisor and an overview of the recording of evidence at Committee hearings to explain their reasons for concluding that no such information was held.



11. Mr Tait was provided with a summary of the Ministers' submissions and asked if he still required a decision from the Commissioner. In response, Mr Tait requested that the Commissioner still come to a decision as he considered that Transport Scotland should hold further information.
12. References in what follows to submissions from Transport Scotland are references to submissions made by the Ministers' Freedom of Information Unit on behalf of Transport Scotland.
13. The submissions received from both Mr Tait and Transport Scotland, insofar as relevant, will be considered full in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to him by both Mr Tait and the Ministers and is satisfied that no matter of relevance has been overlooked.

Section 17(1) – information not held

15. Section 17(1) of FOISA states that, where a Scottish public authority receives a request for information which it does not hold, it must, in accordance with section 17(1) of FOISA, give the applicant notice in writing that it does not hold the information.
16. Transport Scotland initially interpreted Mr Tait's request to be seeking the judgement referred to in his request, and indicated that this was publicly accessible and so exempt from disclosure. However, after Mr Tait made clear in his request for review that he was seeking information about the Government advisor's interpretation of the judgement to inform the opinions expressed in her evidence to the Committee, Transport Scotland notified him in terms of section 17(1) that it did not hold such information.
17. In order to determine whether Transport Scotland has dealt with Mr Tait's request correctly, the Commissioner must be satisfied as to whether, at the time it received Mr Tait's request, Transport Scotland held any information which would fall within the scope of the request.
18. In his application to the Commissioner, Mr Tait commented that he found it incredible that a lawyer would attend such an important meeting with the Committee and would not retain at least the hand written crib sheet they had prepared. He stated that it would be standard practice in any reputable professional firm to retain specific written records (hand written or otherwise) of matters discussed and in particular or statements or opinions given.
19. Mr Tait also commented that if the Government advisor had not retained records, they would certainly be able to restate the opinions and the basis for reaching them.



20. In relation to this final point, the Commissioner would note first of all that his consideration of this matter is restricted to that of whether Transport Scotland held the information requested by Mr Tait in recorded form. FOISA does not require a public authority to create information (for example by a member of staff being called upon to set down their recollections of events) in response to a request. The Commissioner's investigation and this decision have therefore focussed on whether Transport Scotland held, at the time when Mr Tait's request was received, information setting out the Government advisor's interpretation of the judgement which supported the opinions expressed in her evidence to the Committee.
21. In their submissions, Transport Scotland informed the Commissioner that it had contacted the Government advisor to enquire whether any notes were taken and, if so, where they were stored. Her response had advised that her note was handwritten and prepared whilst watching the evidence gathering session on the television in order to address points raised during the session. She indicated that she did not keep the notes as they were her own preparation notes and were not shared with clients. In addition, she noted that since as the Official Record (of the Scottish Parliament) recorded the evidence as provided she did not consider it was necessary to keep her own notes.
22. Transport Scotland also provided comments on the searches (including search terms used) they had undertaken to locate any information in scope of Mr Tait's request, which had resulted in no information being identified.
23. Mr Tait has maintained that information *should be held*. However, the Commissioner's remit extends to the consideration of whether Transport Scotland actually holds the information he has requested.
24. In this case, having considered the submissions received from the Ministers and the searches that have been completed, the Commissioner is satisfied that Transport Scotland has taken reasonable and appropriate steps to establish whether the information sought by Mr Tait is held. These have involved direct checks with the person who would have generated such information, as well as more general searches of its records management systems.
25. On balance of probabilities, the Commissioner is satisfied that (notwithstanding Mr Tait's belief that some record should have been kept) no information is held with regard to the basis for Government advisor's comments to the Committee hearing regarding the judgement.
26. He therefore concludes that Transport Scotland complied with Part 1 of FOSIA by notifying Mr Tait in terms of section 17 that it did not hold the information he had requested.



DECISION

The Commissioner finds that Transport Scotland complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr Tait by advising him, in terms of section 17(1) of FOISA, that it did not hold the information he had requested.

Appeal

Should either Mr Tait or Transport Scotland 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 notice.

Margaret Keyse
Head of Enforcement
26 May 2011



Appendix

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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.

...