

# Decision Notice

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## Decision 108/2019: Mr L and the Risk Management Authority

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### Risk Assessment tools, standards and guidelines and publications

Reference No: 201900123

Decision Date: 17 July 2019



Scottish Information  
Commissioner

## Summary

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The RMA was asked for risk assessment information and guidelines and for copies of documents and papers referred to in a specific letter.

The RMA informed the requester that it did not hold some of the information, that some information was otherwise accessible to him and that some information was exempt from disclosure.

The Commissioner investigated and found that the RMA had partially complied in responding to the request. Although accepting that the RMA was entitled to withhold two documents on the basis that disclosure would prejudice the conduct of public affairs, he did not accept this applied to a document which was available online. He also did not accept that other information was otherwise accessible to the requester.

## Relevant statutory provisions

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1), (4) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 17(1) (Information not held); 25(1) and (2) (Information otherwise accessible); 30(c) (Prejudice to effective conduct of public affairs)

The full text of each of the statutory provisions cited above is reproduced in Appendix 1 to this decision. The Appendix forms part of this decision.

## Background

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1. On 31 October 2018, Mr L made a request for information to the Risk Management Authority (the RMA). He asked for the following documents:
  - (i) Risk Assessment Tools Evaluation Directory (RATED) Revision 4
  - (ii) Standards and Guidelines for Risk Assessment Report Writing
  - (iii) Documents, papers and articles referenced in the letter to his solicitor, dated 18 October 2018.
2. The RMA responded on 5 December 2018. The RMA refused to provide the information requested:
  - (i) the RMA stated that the fourth edition of RATED had not yet been published and consequently was not held.
  - (ii) the RMA stated that the information was otherwise accessible and provided Mr L with a link to where the document was published online.
  - (iii) the RMA notified Mr L that some of the information was not held; some of the information was otherwise accessible to him (providing him with internet links) and some of the articles were exempt from disclosure on the basis that section 30(c) of FOISA applied.
3. With reference to the documents the RMA considered otherwise accessible, it understood that Mr L could be assisted by the prison library to access these.

4. On 21 December 2018, Mr L wrote to the RMA requesting a review of its decision on the basis that the information was not otherwise available to him. In addition, he did not accept that the release of information withheld under section 30(c) of FOISA would damage RMA's ability to conduct its business effectively. Although noting that one document was not held by the RMA (request (iii)), Mr L considered that the RMA could readily obtain it and that it should be provided to him.
5. The RMA notified Mr L of the outcome of its review on 15 January 2019. The RMA upheld its position with the exception of its response to request (ii). The RMA accepted that this document was not accessible to Mr L and provided him with a copy.
6. On 21 January 2019, Mr L wrote to the Commissioner. Mr L applied to the Commissioner for a decision in terms of section 47(1) of FOISA. Mr L stated he was dissatisfied with the outcome of the RMA's review because he did not accept the information was accessible to him and he did not accept the RMA's application of section 30(c) of FOISA. He was also argued, with reference to the information not held, that the RMA had taken an overly rigid interpretation of his request.

## Investigation

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7. The application was accepted as valid. The Commissioner confirmed that Mr L made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 8 February 2019, the RMA was notified in writing that Mr L had made a valid application. The RMA was asked to send the Commissioner the information withheld from Mr L. The RMA provided the information and the case was allocated to an investigating officer.
9. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The RMA was invited to comment on this application and to answer specific questions. These related to whether information withheld under section 25 was actually held by the RMA, whether Mr L's circumstances had been taken into consideration and how release of the information withheld under section 30(c) would limit the RMA's ability to conduct its business.

## Commissioner's analysis and findings

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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 him by both Mr L and the RMA. He is satisfied that no matter of relevance has been overlooked.
11. 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 the information by the authority. This is 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. These qualifications do not apply in this case.

### Section 17(1) – Information not held

12. The RMA notified Mr L that it did not hold information in response to requests (i) and (iii). (Mr L did not challenge the RMA's response to request (i) in his request for review, so it cannot be considered here.) In response to request (iii), the RMA advised that it did not hold a copy of an article and a book referenced in the letter to Mr L's solicitor.

13. In his application, Mr L expressed dissatisfaction with regard to section 17, suggesting that any relevant information relating to the requested information sought should be provided rather than applying an overly rigid interpretation. He suggested that the RMA could easily obtain the information and therefore should provide it.
14. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). If no such information is held by the authority, section 17(1) of FOISA requires the authority to give the applicant notice to that effect.
15. The standard of proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining this, the Commissioner will consider the scope, quality, thoroughness and results of the searches carried out by the public authority. He will consider, where appropriate, any reason offered by the public authority to explain why the information is not held.
16. The Commissioner is satisfied that Mr L's request was specific and the RMA's interpretation of the request appropriate. He does not accept Mr L's suggestion that the RMA's interpretation of the request was "overly rigid". It was reasonable for the RMA to consider whether it held information specifically relevant to Mr L's request. The request did not lend itself to a more general interpretation. FOISA only applies to information held by the public authority. If an authority does not hold the information, it is under no duty to obtain information in order to provide it to the requester.
17. Having taken into account the explanations provide by the RMA, the Commissioner is satisfied that the RMA correctly notified Mr L that it did not hold an article and book encompassed by request (iii).

### **Section 25(1) – Information otherwise accessible**

18. 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.
19. The RMA confirmed that it held the documents encompassed by request (iii) (with the exception of the documents referred to in paragraph 12 above). Three of the documents were freely available online, while five of the documents/articles had to be purchased by the RMA.
20. The RMA provided the web addresses and contact details of publishers to Mr L in response to his request. Whilst acknowledging Mr L's circumstances, the RMA considered that Mr L had the means to purchase the information or to access to the prison library to obtain the information. In considering whether Mr L was able to access the information, the RMA took account of previous correspondence with Mr L which often cited articles and publications, demonstrating his ability to access such items.
21. In his arguments to the Commissioner, Mr L argued that, given his current circumstances, it was unreasonable to apply this exemption on the basis that the information was commercially available.
22. In this case, the Commissioner must consider whether the information is reasonably available to the individual requesting the information. He must take account of the fact that Mr L is currently a prisoner. This clearly has a bearing on what is reasonably available to him. Mr L cannot, for example, access information on the internet or, as confirmed by the

RMA in its response to Mr L's review, obtain information from the internet via the prison library. The alternative means of accessing the information by post to the publishers or through subscription (largely in the United States), would appear to be beyond the limited means of the disposable income of Mr L in the circumstances.

23. In all the circumstances, the Commissioner is not satisfied that the information readily available to the public in general, via internet access, is reasonably obtainable by Mr L. Mr L is at a clear disadvantage in obtaining the information other than by requesting it under section 1(1) of FOISA and the Commissioner does not believe it to be the intention underlying section 25(1) of FOISA that such a disadvantage should be created by applying it.
24. The Commissioner therefore finds that the RMA was not entitled to apply section 25(1) to the information requested by Mr L in response to request (iii). The Commissioner requires RMA to provide Mr L with the articles requested and previously withheld under section 25(1) of FOISA.

### **Section 30(c) – Prejudice to effective conduct of public affairs**

25. RMA applied section 30(c) of FOISA to three documents also identified as falling within the scope of request (iii):
  - LS/CMI User Manual (document one)
  - LS/CMI study (document two); and
  - Female Additional Manual (document three)
26. Section 30(c) exempts information if its disclosure would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs. "Otherwise" is used to differentiate this exemption from the other types of substantial prejudice envisaged in sections 30(a) and (b), such as substantial inhibition to the free and frank provision of advice or exchange of views. This is a broad exemption and the Commissioner expects any public authority citing it to show what specific harm would (or would be likely to) be caused to the conduct of public affairs by disclosure of the information and how that harm would be expected to follow from disclosure. This exemption is subject to the public interest test in section 2(1)(b) of FOISA.
27. Section 30(c) applies where the harm caused, or likely to be caused, by disclosure is at the level of substantial prejudice. The standard to be met in applying the tests contained in section 30(c) is high. In particular, the prejudice in question must be substantial and therefore of real and demonstrable significance. The Commissioner expects authorities to demonstrate a real risk or likelihood of substantial prejudice at some time in the near (certainly foreseeable) future; prejudice cannot be a remote or hypothetical possibility. Each request should be considered on a case by case basis, taking into consideration the content of the information and all other relevant circumstances.
28. Mr L provided detailed reasons why he considered there to be benefits to the RMA in disclosure, including confirming compliance with its statutory duties under the Equality Act 2010 and the Criminal Justice (Scotland) Act 2003 (the 2003 Act). He also considered their provision of accurate risk assessments engaged the Human Rights Act 1998, in terms of Articles 5, 6 and 14 of the European Convention on Human Rights (ECHR) read together with Articles 8, 13 and 14 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD).

29. Mr L explained why he considered that this information was required by him. He explained that disclosure of the information would allow him to identify appropriate adjustments to generic risk assessment tools for individuals with Autistic Spectrum Disorders that should reasonably have been made by the RMA.
30. The RMA explained that these documents had previously been the subject of another request for information in 2012 and had been withheld under section 30(c). As such, the RMA wished to rely upon the arguments provided to the Commissioner at that time, which resulted in *Decision 193/2013*<sup>1</sup>, which it considered were still applicable. This information was also provided to Mr L in the RMA's original response of 5 December 2018.
31. The Commissioner has taken into account all the arguments provided by RMA but does not consider it necessary to repeat them in full here, when they are provided in detail in *Decision 193/2013* and are already known to Mr L. Therefore, only the key points will be reiterated.
32. The RMA was established under the 2003 Act for the purpose of ensuring the effective assessment, management and minimisation of risk of serious harm posed by serious violent and sexual offenders. Statutory functions carried out by the RMA to fulfil that purpose includes work on :
  - Policy and research
  - Guidelines and standards; and
  - Accreditation, education and training.
33. The RMA also has specific responsibility to administer, set standards and accredit assessors in support of the sentence of Orders of Lifelong Restriction. This sentence provides for lifelong management of high risk violent and sexual offenders through detention for an indeterminate period and supervision in the community on release.
34. The RMA submitted that, if the withheld information was disclosed in response to Mr L's request, its ability to fulfil these functions would be substantially prejudiced. This would impact on the actual assessment and management of risk (which it does not carry out itself). The RMA argued that disclosing the LS/CMI tool would reveal to the general public, including those subject to the testing, how to complete and score the risk tools. These tools require to be applied in a structured manner, by qualified individuals, if they are to be effective. Release of the information would compromise the RMA's standards and render compliance with those standards flawed. This would undermine the RMA's ability to write standards and provide advice and would damage the ability of accredited assessors to accurately assess and report on offender risk, compromising their ability to report accurately to the High Court on whether an offender was a high, medium or low risk.
35. Disclosure and subsequent inaccurate assessments would also compromise the RMA's ability to work with other bodies in partnership across the criminal justice system, such as with the Scottish Prison Service: there would be a loss of confidence in the assessment tools, their use would diminish and limit the RMA's ability to conduct its business effectively.
36. The RMA also considered that those bodies and the tool's authors would also have serious reservations about providing information to RMA for the process if there was a real prospect that the RMA would have to release that information into the public domain. Evidence was

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<sup>1</sup> <http://www.itspublicknowledge.info/uploadedFiles/Decision193-2013.pdf>

provided to the Commissioner in support of the claim that this would lead to reluctance in providing information to the RMA.

#### *Commissioner's conclusions*

37. The Commissioner has considered the three documents the RMA withheld under section 30(c) of FOISA. Documents one and three are not in the public domain and have previously been exempted from publication. However, the Commissioner has identified that document two is freely available through a Google search to anyone with internet access. Therefore, section 30(c) cannot be applied to this document and it should be provided to Mr L.
38. With regard to documents one and three, in line with *Decision 193/2013*, the Commissioner accepts that the assessment and management of risks presented by offenders are key public functions, carried out in the public interest. The oversight provided by the RMA is an important element of that process and the Commissioner acknowledges the importance of all of those involved in risk assessment having confidence in the tools used and the eventual results. The Commissioner accepts that disclosure of the information withheld from Mr L under section 30(c) of FOISA would substantially undermine the effectiveness of these tools, which would, in turn, undermine the role of the RMA in promoting effective practice and setting effective standards.
39. The Commissioner also accepts that disclosure of this information would have a substantially prejudicial effect on the RMA's ability to share information with partner agencies, obtain useful information from tool providers and to provide training on the use of these tools in future. Therefore, with regard to documents one and three, the Commissioner is satisfied that disclosure would, or would be likely to, prejudice substantially the effective conduct of public affairs, and so the exemption in section 30(c) applies.

#### *Public interest test*

40. Section 30(c) is a qualified exemption, which means that its application is subject to the public interest test set out in section 2(1)(b) of FOISA. Therefore, having decided that the RMA was entitled to apply section 30(c) to documents one and three, the Commissioner must go on to consider whether, in all the circumstances of the case, the public interest in disclosing the information is outweighed by the public interest in maintaining the exemption.
41. The RMA stated that the public interest arguments provided for *Decision 193/2013* still applied. They recognised a public interest in knowing that risk assessment tools were being applied correctly, diligently, accurately, consistently and without being open to manipulation, with a view to ensuring protection of the public. The RMA did not believe disclosure of the withheld information would further this public interest, given the technical nature of the information and the skill and expertise required to apply it (or judge whether it was being applied) correctly. The RMA noted that the use of risk assessments was already evaluated for quality assurance purposes.
42. The RMA believes it to be in the public interest for it to be able to carry out its functions effectively, in terms of being able to promote best practice, set standards and organise high quality training.
43. The RMA submitted that disclosure of restricted information on how to use and score risk assessment tools would damage the ability of accredited assessors in undertaking their role. It emphasised the importance of these tools being applied professionally, in a structured manner, if they were to be effective. The RMA considered there to be no public interest in

curtailing its ability to undertake its role in imparting information on how to use and score risk assessment tools.

44. Mr L stated that disclosure would ensure compliance with the RMA's statutory duties and would assist in the identification and rectification of miscarriages of justice; therefore, there was a clear public interest in disclosure.
45. Having considered the submissions from Mr L and the RMA, the Commissioner accepts that there is a general public interest in ensuring that public authorities are transparent in their actions and accountable for them. The Commissioner recognises that there is a substantial public interest in ensuring the RMA is able to perform its functions fully and effectively, particularly where these contribute substantially to the protection and maintenance of public safety.
46. The Commissioner acknowledges the risks presented by disclosure to the effective functioning of the assessors, whose work is clearly of considerable significance to the public interest and, by extension, to the criminal justice system more widely. The Commissioner also accepts that there is no public interest in disclosing information which would have major implications for the protection of the public.
47. Therefore, with the exception of document two, which is freely available, the Commissioner has concluded that the public interest in disclosing the withheld information is outweighed by that in maintaining the exemption in section 30(c) of FOISA. The Commissioner finds that the RMA was entitled to withhold the information in documents one and three in line with section 30(c) of FOISA.

## Decision

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

The Commissioner finds that the RMA was correct to:

- notify Mr L that it did not hold the some of the information he requested and
- withhold two documents on the basis that they were exempt under section 30(c) of FOISA.

However, in response to request (iii), the Commissioner has found that the RMA was not entitled to claim that some of the information was otherwise accessible to Mr L under section 25(1) of FOISA. The Commissioner also found that the RMA was not entitled to withhold document two under section 30(c) of FOISA. In those respects, the RMA failed to comply with Part 1 of FOISA.

The Commissioner therefore requires the RMA to provide Mr L with:

- the information it considered otherwise accessible to him and
- the LS/CMI study,

by **2 September 2019**.

## Appeal

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Should either Mr L or the RMA 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.

## **Enforcement**

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If the RMA fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that the RMA has failed to comply. The Court has the right to inquire into the matter and may deal with the RMA as if it had committed a contempt of court.

**Margaret Keyse**  
**Head of Enforcement**

**17 July 2019**

### 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.
- ...
- (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 –
- (a) section 25;
- ...

#### 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.
- ...

## **25 Information otherwise accessible**

- (1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.
- (2) For the purposes of subsection (1), information-
  - (a) may be reasonably obtainable even if payment is required for access to it;
  - (b) is to be taken to be reasonably obtainable if-
    - (i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or
    - (ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by, members of the public on request, whether free of charge or on payment.

...

## **30 Prejudice to effective conduct of public affairs**

Information is exempt information if its disclosure under this Act-

...

- (c) would otherwise prejudice substantially, or be likely to prejudice substantially, the effective conduct of public affairs.

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