

Decision Notice 109/2020

Emergency and Compulsory Treatment

Applicant: The Applicant

Public authority: The Scottish Ministers

Case Ref: 201902290



Scottish Information
Commissioner

Summary

The Ministers were asked for information concerning emergency and compulsory treatment under the Mental Health (Care and Treatment) Scotland Act 2003. The Ministers stated that they did not hold the requested information.

Following investigation, the Commissioner accepted that the requested information was not held.

Relevant statutory provisions

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

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

Background

1. On 10 June 2019, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant requested information related to emergency and compulsory treatment. The request is set out in full in Appendix 2.
2. The Ministers did not respond to the request.
3. On 9 July 2019, the Applicant emailed the Ministers, requesting a review of their failure to respond to her request.
4. On 12 July 2019, the Ministers apologised for the delay and notified the Applicant of the outcome of their review. They stated that they did not hold the information as they were not responsible for the collection or collation of these statistics. They advised the Applicant to contact the Mental Welfare Commission for Scotland (MWCS), which may hold the information, and noted that the MWCS published a Visit and Monitoring Report on Place of Safety orders in 2018:
www.mwscot.org.uk/media/431345/Place%20of%20safety%20report%202018.pdf.
5. On 8 January 2020, the Applicant applied to the Commissioner in terms of section 47(1) of FOISA. The Applicant stated that she was dissatisfied with the outcome the Ministers' review because she considered that they were ultimately accountable to the Scottish Parliament for the activities and performance of the MWCS and its use of resources.

Investigation

6. The application was accepted as valid. The Commissioner confirmed that the Applicant 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.
7. On 8 January 2020, the Ministers were notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.

8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The Ministers were invited to comment on this application and to answer specific questions.
9. The Ministers responded to the questions raised regarding the searches they had conducted and provided submissions as to why they were satisfied that the requested information was not held by them in their own right.

Commissioner's analysis and findings

10. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the Ministers. 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 that information by the 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.
12. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give notice in writing to that effect.

The Applicant's submissions

13. The Applicant suggested that the information was held by the Ministers due to the conditions associated with funding and the fact that the Ministers are ultimately accountable to the Scottish Parliament. The Applicant highlighted that the Ministers' responsibilities with respect to MWCS are:
 - agreeing the MWCS's strategic objectives in light of its statutory duties and the policy and performance framework which the MWCS will operate.
 - providing information to the Scottish Parliament about the MWCS as required.
 - agreeing the budget and associated grant-in-aid requirements to be paid to the MWCS and securing the necessary Parliamentary approval.

The Ministers' submissions

14. In its submissions to the Commissioner, the Ministers confirmed that they did not hold the information requested by the Applicant.
15. The Ministers stated that the MWCS has a statutory duty to monitor the operation of the Mental Health (Care and Treatment) Scotland Act 2003¹ (the 2003 Act). Under the 2003 Act, it receives notice of the use of compulsory measures (i.e. those providing medical care and treatment must let MWCS know if a person is detained under the 2003 Act).
16. The MWCS is accountable to the Ministers in discharging its statutory functions. However, for administrative purposes, the MWCS is classified as an independent NHS body with a

¹ <https://www.legislation.gov.uk/asp/2003/13/contents>

major role in protecting the interests of people facing mental health challenges or incapacity. Therefore, although the Ministers appoint the MWCS Chair and the Board members, it remains independent from the Scottish Government. Whilst the MWCS have a statutory duty to monitor the operation of the 2003 Act, and in doing so they collate and analyse information and produce statistics and monitoring reports, they do not have an obligation to provide this information to the Ministers, nor do the Ministers themselves have an obligation to hold this information.

17. The Scottish Government and the MWCS have a Framework agreement which sets out the roles of the Commission and the Scottish Government, and outlines how the Commission is held to account for use of public funds. This is publically available on the MWCS website: https://www.mwscot.org.uk/sites/default/files/2019-06/sq_mou_2019.pdf.
18. The MWCS publish an annual statistical monitoring report detailing the number of instances of each type of detention. The MWCS do not have an obligation to provide the Ministers with statistical information and, as it is made publically available on its website, the Ministers do not need to specifically request this from the MWCS. However, the MWCS usually provide the Ministers with advance copies of any reports that they intend to publish, which includes the Annual Monitoring Report, as well as copies of local visit reports and investigation reports undertaken by the MWCS. They do not generally provide the Ministers with ongoing unpublished statistical information about the use of the 2003 Act.
19. The Ministers explained that the monitoring reports provided by the MWCS do not contain the specific information requested by the Applicant, and therefore the information is not held.
20. The Ministers noted that the latest report covering 2018/19 is accessible from: https://www.mwscot.org.uk/sites/default/files/2019-10/MHA-MonitoringReport-2019_0.pdf.
21. The Ministers submitted that, in line with their obligations under section 15(1) (Duty to provide advice and assistance) of FOISA, they informed the Applicant of both the Annual Monitoring Report, as it contains general information about the use of various orders under the 2003 Act and the numbers of place of safety notifications, and another recently published Visit and Monitoring Report on Place of Safety orders in 2018.
22. The Ministers noted that they had informed the Applicant that the MWCS may hold further, more detailed, information in respect of her request and suggested she may wish to contact them directly. They also provided the Applicant with a link to both of the above-mentioned reports on the MWCS's website, along with a link to the MWCS's online Freedom of Information page, which contained details of how to contact them.
23. In summary, the Ministers stated that the MWCS may hold some additional data related to the operation of the 2003 Act, which is not included in their annual publication, which is why they had directed the Applicant to the MWCS to check whether it held the specific data requested.

Searches

24. The Ministers explained that the case handler dealing with this request for information had a good working knowledge of the policy area involved, and the information held in relation to this request. They were aware that the Ministers do not have a statutory duty to monitor the operation of the 2003 Act, and that this duty falls to the MWCS, who are independent from the Scottish Government. The case handler therefore knew that the MWCS are informed directly about each instance of these detentions and this data is not provided to the Ministers, and as such information relating to mental health detention statistics is not held by

the Ministers. Consequently, the Ministers did not consider that any searches were necessary in this case.

The Commissioner's findings

25. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
26. The Commissioner notes that the Ministers advised the Applicant to contact the MWCS directly for the requested information. Having considered the information on the MWCS's website and the Ministers' submissions, he is satisfied that the Ministers do not hold the requested information and the MWCS is the organisation that is likely to hold the requested information.
27. Taking all of the above into consideration, the Commissioner is satisfied, on the balance of probabilities, that the Ministers do not (and did not, on receiving the request), hold any information falling within the scope of the Applicant's request. The Commissioner is satisfied that the Ministers do not hold the requested information, in terms of section 17(1) of FOISA.

Decision

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

Appeal

Should either the Applicant or the Ministers 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

21 September 2020

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.

...

Appendix 2: The request

Please supply me with information contained in your records; Concerning Emergency & Compulsory Treatment (Mental Health Section Orders).

Please advise how many individuals have been sectioned without an order granted for compulsory treatment or one of a number of strictly defined set of circumstances, i.e how many individual's have been assessed within a Police custody suite over the weekend and had a section order imposed on them without their consent in the past year?

Please break this number down month on month and weekend upon weekend?

Please advise how many of these individuals were taken from a private location to a place of safety by use of a breach of the peace charge or as is now an offence under the criminal justice and licensing act?

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