

Decision Notice



Decision 110/2011 Dr N and the Scottish Public Services Ombudsman

Complaints about a Scottish public authority

Reference No: 201100499
Decision Date: 1 June 2011

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Kevin Dunion
Scottish Information Commissioner

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Summary

Dr N requested from the Scottish Public Services Ombudsman (the SPSO) specified information about a particular Scottish public authority. The SPSO responded by providing some information but withholding complaints-related information under section 26(a) of FOISA. It also refused to respond to part of Dr N's request (relating to the complaints file references) on the basis that it was a repeat of a previous request, citing section 14(2) of FOISA. Following a review, Dr N remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SPSO had dealt with Dr N's request for information in accordance with Part 1 of FOISA, by correctly applying an exemption under section 14(2) to part of the request which repeated an earlier one. He also found that the SPSO was correct in its application of the exemption in section 26(a) of FOISA to the remaining information Dr N covered by the application, given the relevant prohibition on disclosure in the Scottish Public Services Ombudsman Act.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(b) (Effect of exemptions); 14(2) (Vexatious or repeated requests) and 26(a) (Prohibitions on disclosure)

The Scottish Public Services Ombudsman Act 2002 (the SPSO Act) section 19 (Confidentiality of information)

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 3 February 2011, Dr N wrote to the SPSO, in the context of previous correspondence relating to complaints against a specified Scottish public authority. Dr N requested a list of the complaints files, indicating the reference number and the disclosed contents of each. More specifically, Dr N asked to be supplied with the information under the following headings:
 - a. File reference number;
 - b. Date received by SPSO;



- c. Work flow stage;
- d. Reason for closure (if closed);
- e. Items disclosed/under FOISA;
- f. Items disclosed under the Data Protection Act 1998 (the DPA);
- g. Items withheld and reasons under FOISA.

Dr N also sought the source of each document, i.e. the job title, or if possible the name, of the member of staff holding each document covered by the request.

2. The SPSO responded on 3 February 2011, disclosing certain information which it believed to be relevant, but which was not held in its complaints files. The SPSO also disclosed the information it held which fell within categories b, c and d listed above. However, it refused to disclose the file reference numbers (category a) under section 14(2) of FOISA, as it considered this element of Dr N's request to be a repeat of earlier requests in respect of which it was not obliged to respond again: it applied the same reasoning in respect of any information it held which related to the applicant. In relation to the remaining information (specific items from complaints files), the SPSO asserted that section 26(a) of FOISA applied, further explaining that section 19 of the SPSO Act prohibited the disclosure information obtained in respect of a complaint.
3. On 7 February 2011, Dr N wrote to the SPSO requesting a review of its decision. Dr N questioned the completeness of the response and refused to accept either the prohibition on disclosure cited by the SPSO or that part of the request was repeated.
4. The SPSO notified Dr N of the outcome of its review on 4 March 2011, confirming what information it held and which fell within the scope of the request. It also adhered to its earlier decisions, withholding certain information under section 26(a) of FOISA and refusing to comply with that part of the request relating to file reference numbers (on the basis that it was repeated) under section 14(2). Regarding information relating to Dr N, the SPSO advised that it had already dealt with requests for this information under the DPA.
5. On 20 March 2011, Dr N wrote to the Commissioner, stating reasons for being dissatisfied with the outcome of the SPSO'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 Dr N 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

7. On 1 April 2011, the investigating officer contacted the SPSO, 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. In particular, the SPSO was asked to justify its reliance on sections 14(2) and 26(a) of FOISA and also to explain in detail the steps it had taken to identify and locate the information it held which fell within the scope of Dr N's request.
8. The submissions received from both the SPSO and Dr N, insofar as relevant, will be considered fully in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

9. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Dr N and the SPSO and is satisfied that no matter of relevance has been overlooked.

Interpretation of the request and information held by the authority

10. The Commissioner has noted Dr N's point that the request was for a list of all records held in the relevant complaints files. The Commissioner cannot accept this, however. Dr N identifies the relevant request as that dated 6 January 2011. This refers to previous correspondence but is also capable of being read as an independent request for information. As such, while it seeks the identification of items in the relevant files disclosed under either FOISA or the DPA, or (with reasons) withheld under FOISA, the Commissioner cannot interpret it as a general request for a listing of the entire contents of the relevant files.
11. The Commissioner has also considered the SPSO's submissions on the steps it took to identify and locate the information covered by Dr N's request. In the circumstances of this particular case, he is satisfied that these were adequate.
12. Having considered Dr N's application, the Commissioner has also concluded that it does not cover that part of the request relating to the "source" of documents (see paragraph 1 above). Consequently, he will not cover that part further in this decision.

Applicant's personal data

13. Firstly, the Commissioner notes that Dr N's application sets out the applicant's dissatisfaction with the SPSO's handling of the request insofar as it relates to information relating to the applicant. Basically, Dr N's concern is that the SPSO did not consider such information for disclosure under FOISA.



14. In its response to Dr N's requirement for review, the SPSO advised that it had already dealt with requests for information it held about Dr N under the DPA. Information relating to Dr N as an identifiable individual is (as the applicant is aware) that individual's personal data, and consequently is absolutely exempt from disclosure under section 38(1)(a) of FOISA. That is because disclosure of such information to the data subject is properly dealt with under the DPA. There is, therefore, nothing to be gained from consideration of such information under FOISA, and in the circumstances the Commissioner can identify no point in considering this aspect of Dr N's application further.
15. Those elements of the requested information which remain to be considered in this decision, therefore, are the file reference numbers (category a in paragraph 1 above, dealt with by the SPSO under section 14(2) of FOISA) and the items disclosed or withheld from the complaints files (categories e, f and g – the information withheld under section 26(a) of FOISA), with the exception of Dr N's own personal data.

Section 14(2) of FOISA

16. In making an application to the Commissioner, Dr N disagreed with the SPSO's application of section 14(2) of FOISA in respect of file reference numbers.
17. The full text of section 14(2) is set out in the Appendix below. For this provision to apply:
 - The authority must have complied with a previous request from the same applicant
 - That previous request must be identical or substantially similar to the request under consideration
 - A reasonable period of time must not have passed between the making of the two requests.

Was the previous request complied with?

18. Dr N's concern here is that in refusing the previous request, the SPSO did not comply with it. The Commissioner does not accept this argument. The SPSO's responses to the previous request, both initially and on review, addressed the request in full, and notified Dr N appropriately of how to challenge its decision if dissatisfied with the response provided. Dr N did not challenge that decision within the timescale required by FOISA.
19. In the absence of any application to him at the appropriate time, the Commissioner is unable to conclude that the response given to the previous request for information did not comply with that request. The Commissioner is therefore satisfied that the SPSO complied with the previous request in line with the requirements laid down in FOISA.



Was the second request identical or substantially similar to the first?

20. In this connection, the Commissioner has considered Dr N's comments on the differing contexts of the two requests. The scope of each request is also different, and the Commissioner acknowledges that the requests cannot be regarded as identical. On the other hand, insofar as they relate to file reference numbers, both requests are clearly for information which is identical in character. The refusal of the previous request related simply and directly to file reference numbers. In all the circumstances, the Commissioner is satisfied that the two requests can legitimately be characterised as substantially similar.

Had a reasonable period of time passed?

21. The Commissioner has considered the submissions he has received on this point from both the SPSO and Dr N. He has also considered the nature of the information requested. In the circumstances of this particular case, he is satisfied that there has been no change in either that information or the circumstances pertaining to it between the first request considered by the SPSO and the subsequent under consideration here. Consequently, he is satisfied that a reasonable period of time had not passed between the making of the two requests.
22. In all the circumstances, therefore, the Commissioner considers that the SPSO was entitled to refuse to comply with that part of Dr N's request relating to file reference numbers in terms of section 14(2) of FOISA.

Section 26(a)

23. The SPSO withheld the information falling within categories e, f and g specified in Dr N's request under section 26(a) of FOISA.
24. Section 26(a) of FOISA states that information is exempt information if its disclosure by a Scottish public authority (otherwise than under FOISA) is prohibited by or under an enactment. Section 26(a) is an absolute exemption, and therefore is not subject to the public interest test. In this case, the SPSO argued that such a prohibition was created by section 19 (and also section 12) of the SPSO Act.
25. Section 19(1) of the SPSO Act provides that information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for a limited range of purposes specified elsewhere in that section. These purposes do not include disclosure of information under FOISA.



26. The Commissioner accepts that section 19(1) of the SPSO Act creates a prohibition on the disclosure of information which engages section 26(a) of FOISA. However, section 19(1) is clear in providing that the prohibition on disclosure only relates to information "obtained" by the Ombudsman or any of his advisers in connection with a matter in respect of which a complaint or a request has been made. Clearly, information in the SPSO's complaints files is held in connection with such matters, but it does not necessarily follow that it has been "obtained". In this connection, the Commissioner acknowledges (at least in principle) Dr N's argument that information generated internally by the SPSO should not be regarded as "obtained" by the authority, although he also has to acknowledge arguments presented by the SPSO's, to the extent that such internally-generated information may draw heavily on information obtained from the parties to the complaint and what is truly internal may not be readily severable from what has been obtained.
27. In this case, having considered the arguments put forward by both the SPSO and Dr N, the Commissioner is satisfied that the information to which the SPSO applied section 26(a) was obtained by the Ombudsman in connection with a matter in respect of which a complaint or a request had been made. In the absence of any purpose which would permit disclosure, he is also satisfied that its disclosure was prohibited under section 19 of the SPSO Act.
28. The Commissioner therefore considers that the SPSO was correct in withholding information under the exemption in section 26(a) of FOISA, as specified in paragraph 23 above. Having found that the prohibition in section 19 of the SPSO Act was applicable in this case, he is not required (nor does he intend) to consider the effect of section 12 of that Act on the information in question.

DECISION

The Commissioner finds that the Scottish Public Services Ombudsman complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Dr N.



Appeal

Should either Dr N or the SPSO 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
1 June 2011



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 –

- (a) the provision does not confer absolute exemption; and

...

- (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 –

...

- (b) section 26;

...

14 Vexatious or repeated requests

...

- (2) Where a Scottish public authority has complied with a request from a person for information, it is not obliged to comply with a subsequent request from that person which is identical or substantially similar unless there has been a reasonable period of time between the making of the request complied with and the making of the subsequent request.



26 Prohibitions on disclosure

Information is exempt information if its disclosure by a Scottish public authority (otherwise than under this Act)-

(a) is prohibited by or under an enactment;

...



Scottish Public Services Ombudsman Act 2002

19 Confidentiality of information

- (1) Information obtained by the Ombudsman or any of the Ombudsman's advisers in connection with any matter in respect of which a complaint or a request has been made must not be disclosed except for any of the purposes specified in subsection (2) or as permitted by subsection (3).
- (2) Those purposes are—
 - (a) the purposes of—
 - (i) any consideration of the complaint or request (including any statement under section 11),
 - (ii) any investigation of the matter (including any report of such an investigation),
 - (b) the purposes of any proceedings for—
 - (i) an offence under the Official Secrets Acts 1911 to 1989 alleged to have been committed in respect of information obtained by the Ombudsman,
 - (ii) an offence of perjury alleged to have been committed in the course of any investigation of the matter,
 - (c) the purposes of an inquiry with a view to the taking of any of the proceedings mentioned in paragraph (b),
 - (d) the purposes of any proceedings under section 14.
- (3) Where information referred to in subsection (1) is to the effect that any person is likely to constitute a threat to the health or safety of patients, the Ombudsman may disclose the information to any person to whom the Ombudsman thinks it should be disclosed in the interests of the health and safety of patients.
- (4) In relation to information disclosed under subsection (3), the Ombudsman must—
 - (a) where the Ombudsman knows the identity of the person to whom the information relates, inform that person of the disclosure of the information and of the identity of the person to whom it has been disclosed, and
 - (b) inform the person from whom the information was obtained of the disclosure.
- (5) It is not competent to call upon the Ombudsman or the Ombudsman's advisers to give



evidence in any proceedings (other than proceedings referred to in subsection (2)) of matters coming to the knowledge of the Ombudsman or advisers in connection with any matter in respect of which a complaint or request has been made.

(6) A member of the Scottish Executive may give notice in writing to the Ombudsman with respect to—

- (a) any document or information specified in the notice, or
- (b) any class of document or information so specified,

that, in the opinion of the member of the Scottish Executive, the disclosure of the document or information, or of documents or information of that class, would be contrary to the public interest.

(7) Where such a notice is given nothing in this Act is to be construed as authorising or requiring the Ombudsman or any of the Ombudsman's advisers to communicate to any person or for any purpose any document or information specified in the notice, or any document or information of a class so specified.

(8) Information obtained from -

- (a) the Information Commissioner by virtue of section 76 of the Freedom of Information Act 2000 (c.36)
- (b) the Scottish Information Commissioner by virtue of section 63 of the Freedom of Information (Scotland) Act 2002 (asp 13),

is to be treated for the purposes of subsection (1) as obtained in connection with any matter in respect of which a complaint or request has been made.

(9) In relation to such information, subsection (2)(a) has effect as if—

- (a) the reference in sub-paragraph (i) to the complaint or request were a reference to any complaint or request, and
- (b) the reference in sub-paragraph (ii) to the matter were a reference to any matter.

(10) In this section and section 20 references to the Ombudsman's advisers are to persons from whom the Ombudsman obtains advice under paragraph 10 of schedule 1.