

Decision Notice 117/2021

Parental alienation

Applicant: The Applicant

Public authority: The Scottish Ministers

Case Ref: 202100377



Scottish Information
Commissioner

Summary

The Ministers were asked for information explaining the content of a specific report. They advised the Applicant that the information requested was available on their website

The Commissioner investigated and found that, other than the information was available on-line, the Ministers held no further information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 2(1) and (2)(a) (Effect of exemptions); 17(1) (Notice that information is not held); 25(1) (Information otherwise accessible)

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

1. On 1 January 2021, the Applicant made a request for information to the Scottish Ministers (the Ministers). The Applicant referred to the Scottish Parliament Justice Committee Stage 1 Report¹ on the Children (Scotland) Bill (the Bill), which (at paragraph 230) stated:

The Scottish Government consulted on the inclusion of a specific factor relating to parental alienation but ultimately decided against it. Scottish Government officials told the Committee that the term parental alienation is “much disputed” and therefore the Government concluded that it would not be appropriate to include it in the Bill.

The Applicant asked:

... what was the specific factor relating to parental alienation that was considered not appropriate to include the recognition of parental alienation in the Children Scotland Bill?

2. The Ministers responded on 27 January 2021. They stated that the information that they had permission to publicise was available on the Scottish Government website and provided a web-link. The Ministers included a link to the Children (Scotland) Act 2020 and advised that the list of factors for the court to consider before making an order (relating to parental responsibilities etc., under section 11 of the Children (Scotland) Act 1995) is at section 16 of the 2020 Act.
3. On 28 January 2021, the Applicant wrote to the Ministers, requesting a review of their decision and explaining why she was dissatisfied with the response. In a communication dated 29 January 2001, she clarified that the reason for her dissatisfaction was that the Ministers had not answered her request.
4. The Ministers notified the Applicant of the outcome of their review on 11 February 2021. The Ministers advised the Applicant they were applying section 25(1) of FOISA, on the basis that the information held was available on their website. They provided an updated web-link to where the information requested could be obtained.

¹ <https://sp-bpr-en-prod-cdnep.azureedge.net/published/J/2020/5/1/Stage-1-Report-on-the-Children--Scotland--Bill/JS0520R07.pdf>

5. On 23 March 2021, following further correspondence with the Ministers, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant stated she was dissatisfied with the outcome of the Ministers' review because they had not responded to the question set out in her request.
6. The Applicant explained that the request was to be interpreted as a request for the “specific factor” relating to (or within the definition of) “parental alienation” that the Ministers had considered when deciding that it was not appropriate to include the recognition of “parental alienation” in the Children (Scotland) Bill (the Bill). She submitted that a single factor *related to parental alienation* was consulted on and, on that basis, stated that the Ministers had failed to respond to the specifics of her request. She provided submissions as to why she believed the Ministers should hold the information she had requested.

Investigation

7. 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.
8. On 26 March 2021, the Ministers were notified in writing that the Applicant had made a valid application. 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. On 5 May 2021, the Ministers were invited to comment on this application and to answer specific questions, focusing on their, and the Applicant's, interpretation of the request and their response in terms of section 25(1) of FOISA.
10. The Ministers responded with submissions: these will be considered below.
11. On 21 June 2021, the Ministers wrote to the Applicant and advised that they had understood her request to be for information held on why “parental alienation” is not included in the checklist of factors for the courts to consider. They confirmed their reliance on section 25(1) of FOISA in relation to the information that was available on-line, and accepted that in their response they should have more clearly signposted her to the relevant information. They provided the Applicant with further explanation and a link to where the relevant information was available.
12. In relation to the Applicant's interpretation of the request, as outlined above, the Ministers provided the Applicant with a notice, in terms of section 17(1) of FOISA, confirming that they held no information.
13. The Applicant confirmed receipt of the response from the Ministers and wished the Commissioner to issue a Decision Notice on the matter.

Commissioner's analysis and findings

14. 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.

Interpretation of the request

15. As outlined above, the Applicant submitted that her request should be interpreted as her seeking the “specific factor” relating to “parental alienation” that the Ministers had considered when deciding that it was not appropriate to include the recognition of “parental alienation” in the Bill.
16. The Ministers submitted that they had interpreted the Applicant’s request as her asking about the statutory checklist of factors in the Bill, rather than a “factor” within the definition of “parental alienation” and, on that basis, had directed the Applicant to section 16 of the 2020 Act, where the checklist could be found.
17. The Commissioner accepts that the request, as worded by the Applicant, is open to interpretation and was not fully clarified until during his investigation. During the investigation, however, as outlined above, the Ministers fully considered each interpretation of the request and provided submissions to the Commissioner. He will consider both interpretations below.

Information held by the Ministers

18. 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.
19. 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, although the applicant’s reasons may be relevant to the investigation of what is actually held. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.
20. 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(1) is absolute, in that it is not subject to the public interest test set out in section 2(1)(b) of FOISA.
21. On the basis of their interpretation, the Ministers submitted that they considered section 25(1) of FOISA was engaged, on the basis that the information held could reasonably be obtained by the Applicant other than requesting it under section 1(1) of FOISA.
22. The Ministers submitted that that the request referred to paragraph 230 of the Stage 1 report on the Children (Scotland) Bill. They submitted that this reflected a response by a Scottish Government official to the Justice Committee of the Parliament, when officials gave oral evidence on the Bill on 26 November 2019. They drew attention to page 8 of 18 of the following report, where the term parental alienation was discussed in oral evidence:
<https://archive2021.parliament.scot/parliamentarybusiness/report.aspx?r=12399&mode=pdf>
23. The Ministers accepted that, in providing their response in terms of section 25(1) of FOISA, they should have signposted the Applicant to the response by the Scottish Government official, highlighting that it set out the recorded explanation of why section 12 of the Bill did not include a specific statutory requirement relating to parental alienation within the checklist of factors. As outlined above, this was rectified in their further response to the Applicant on 21 June 2021.

24. While the Ministers acknowledged that in responding to the Applicant they had not interpreted the request in the terms explained and clarified by the Applicant during the investigation, they also considered the Applicant's interpretation of the request afresh. The Ministers confirmed that they did not hold information as to any "specific factor" within the terms "parental alienation". It did not believe the term could be broken down into specific factors.
25. Again, as outlined above, during the investigation, the Ministers issued the Applicant with a notice in terms of section 17(1) of FOISA, advising that they did not hold information that would fall within the scope of the request, as interpreted by the Applicant.
26. The Ministers explained the enquiries they had undertaken to establish what information they held falling within the scope of each interpretation of the request, as outlined above. They confirmed the searches and enquiries they undertook to ascertain what information they held falling within the scope of the request, including staff consulted: the conclusion of which was that no information was held.
27. The standard of 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 must first of all consider the interpretation and scope of the request and thereafter the quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately, however, 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).
28. In the case of the request under consideration, the Commissioner accepts the Ministers' initial interpretation was reasonable and that, on that basis, it was entitled to issue a response in terms of section 25(1) of FOISA. This was further clarified in their response of 21 June 2021, when they provided a direct link to where the published information was readily available.
29. In relation to the Applicant's interpretation of the request, the Commissioner accepts that, by the end of the investigation, the Ministers took adequate, proportionate steps in the circumstances to establish what information it held. Given the explanations and other submissions provided, he is satisfied that the Ministers do not (and did not, on receipt of the request) hold the information as interpreted by the Applicant, and were correct to give the Applicant notice, in terms of section 17(1) of FOISA, that they held no information falling within the scope of the request as interpreted by her.

Decision

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in dealing with the Applicant's request.

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

5 August 2021

Appendix 1: 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.

...

- (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.

...

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.

...

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