

Decision Notice



Decision 206/2013 Mr and Mrs B and the Scottish Court Service

Court of Session case

Reference No: 201300349

Decision Date: 17 September 2013

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Rosemary Agnew

Scottish Information Commissioner

Kinburn Castle
Doubledykes Road
St Andrews KY16 9DS
Tel: 01334 464610



Summary

On 27 October 2012, Mr and Mrs B (the Bs) made a request to the Scottish Court Service (SCS) for information concerning a court case at the Court of Session. The SCS provided some information to the Bs, but informed them that other information was exempt from disclosure. On 20 November 2012, the Bs submitted a further request for information to the SCS regarding the same court case and the SCS responded to it the next day. Following a review of the responses to both requests, the Bs remained dissatisfied and applied to the Commissioner for a decision.

After investigation, the Commissioner found that the SCS was entitled to withhold all the information covered by the request of 27 October 2012 under section 37(1)(a)(i) and (iii) of FOISA. The Commissioner also found that the SCS had failed to provide the Bs with reasonable advice and assistance in relation to their second request, as required by section 15 of FOISA, and had failed to give notice that it did not hold the information they had asked for.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1) and (2)(d)(Effect of exemptions); 15(1) (Duty to provide advice and assistance); 17(1) (Notice that information is not held); 37(1)(a)(i) and (iii) (Court records, etc.)

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. This decision relates to two requests submitted to the SCS for information about a specified case at the Court of Session.

Request 1

2. On 27 October 2012, the Bs made a request (request 1) for information about a specific case at the Court of Session, stating they wished to be provided with any available information, whether it was “a complete court record or partial detailed notes of the Court of Sessions Judge ...final judgement or conclusion.”



3. The SCS responded to request 1 on 31 October 2012. The SCS provided the Bs with a copy of a court order and explained that the proof which had been due to take place had settled out of court. The SCS withheld the remaining information covered by the request under section 37 of FOISA.

Request 2

4. On 20 November 2012, the Bs submitted a further, related request (request 2) asking what branch of law was the subject of the case specified in request 1, giving examples such as civil, family, matrimonial, conveyancing, child law, or debt recovery.
5. On 21 November 2012, the SCS responded, informing the Bs that “cases before the Court of Session are covered by Civil Legislation”.
6. On 28 November 2012, the Bs wrote to the SCS requesting a review of both of the responses provided. The Bs pointed out that any member of the public attending the case could easily have heard “all the exact details” of this case as well as finding out “which branch of civil litigation was involved”.
7. The SCS notified the Bs of the outcome of its review on 4 December 2012, upholding its decision, in relation to request 1, to withhold information under section 37 of FOISA. In relation to request 2, the SCS explained that “it would not be usual for the exact category of case to be stated at the hearing”. The SCS also clarified that as the court proceedings were not recorded, it was unable to confirm whether the category of case was mentioned in public.
8. On 25 January 2013, the Bs wrote to the Commissioner, stating that they were dissatisfied with the outcome of the SCS’s review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
9. The application was validated by establishing that the Bs had made requests 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 those requests.

Investigation

10. The SCS was contacted by the investigating officer (on 8 March 2013) regarding the Bs’ application, and was given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and was asked to respond to specific questions. The SCS was asked to confirm what information was held in relation to the specified court case, and why it considered that the exemption in section 37 of FOISA applied. In relation to request 2, the SCS was asked to confirm what information was recorded at the time of the request and request for review, and to comment on any help and assistance provided to the Bs.



Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the relevant submissions, or parts of submissions, made to her by both the Bs and the SCS. She is satisfied that no matter of relevance has been overlooked.

Request 1

12. The SCS withheld information covered by request 1 under section 37 of FOISA. Section 37 ensures that existing procedures which govern access to information generated by or used in court (and other legal dispute resolution) proceedings are not overridden by FOISA. The exemption ensures that where authorities hold information solely because of their involvement in court proceedings, an inquiry or arbitration, they are not required to release it outwith those proceedings.
13. Specifically, section 37(1)(a) of FOISA states that information is exempt information if it is contained in a document:
- (i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter;
 - (ii) served on, or by, a Scottish public authority for the purposes of such proceedings; or
 - (iii) created by a court or member of its administrative staff for the purposes of, or in the course of, such proceedings.
14. Section 37(1) will only be engaged if the authority holds the information solely because it is contained in such a document.
15. The Commissioner notes that, in essence, section 37(1) provides an absolute exemption (as it is not subject to the public interest test contained in section 2(1) of FOISA) in respect of all documents lodged with, or otherwise placed in the custody of, a court or created by a court (or its staff) for the purposes of court proceedings where the information is held by the authority solely because it is contained in such a document.
16. The SCS submitted that the information falling within the scope of request 1 was exempt in terms of section 37(1)(a)(i) and (iii) of FOISA as it was either lodged with, or created by, a court for the purposes of proceedings. The SCS explained that the Bs were not entitled to the information under existing rules for access to court papers lodged at the Court of Session¹. In essence, the SCS argued there was no means of access open to the Bs for the information they were requesting and this was why it was not disclosed to them.

¹ See <http://www.legislation.gov.uk/ukxi/1994/1443/contents/made> and also the "Rules of practice" published at <http://www.scotcourts.gov.uk/>



17. In their request for review and in their application to the Commissioner, the Bs commented on the public nature of court hearings, arguing that the particular information they were seeking was capable of disclosure given that members of the public have the opportunity to attend court hearings in the public gallery, thus rendering court proceedings open to all.
18. The arguments raised by the Bs are based upon the premise that any information capable of being heard in court is equally capable of disclosure under FOISA. This premise is understandable, but it is not the test which must be used when determining whether section 37 of FOISA might apply. Essentially, section 37(1) provides an absolute exemption in respect of all documents lodged with, or otherwise placed in the custody of a court or created by a court (or its staff) for the purposes of court proceedings where the information is held by the authority solely because it is contained in such a document. This is irrespective of whether or not the information is made known to the public attending court during hearings.
19. In this case, the Commissioner is satisfied that all of the documents under consideration have either been lodged with the court in relation to proceedings which had commenced, or were created by members of court staff for the purposes of, and in the course of, relevant proceedings.
20. The Commissioner is also satisfied that the information is held by the SCS solely because it is contained in such documents.
21. Consequently, the Commissioner is satisfied that the information requested by the Bs in their first request is exempt from disclosure by virtue of section 37(1)(a) of FOISA. This is an absolute exemption which is not subject to the public interest test contained in section 2(1)(b) and so the Commissioner is not required to go on to consider whether the public interest in disclosing the information is outweighed by that in maintaining the exemption.
22. The Commissioner will now go on to consider the Bs' second request.

Request two

23. The Bs asked the SCS for information about the area or branch of law which was considered or debated in the specified court case.
24. As noted above, in its initial response, the SCS stated that "cases before the Court of Session are covered by Civil legislation". The Bs complained in their request for review that the SCS response was too general, as it did not provide the exact branch of law for the case they specified. They also highlighted that those attending court would easily find out which branch of civil "litigation" was involved.
25. In its submissions, the SCS advised it did not use the term "branch of law" and detailed some of its rules and practice by way of explanation. During the investigation, the SCS indicated that it had considered at review stage whether it could be more specific when addressing request 2. The SCS explained that it decided not to go down this route as it was guided by the terminology Mr and Mrs B had used in their letter of 20 November 2012 (e.g. "Civil", "Matrimonial" etc).



26. Section 15 of FOISA requires a Scottish public authority to provide reasonable advice and assistance to a person who makes, or proposes to make, a request for information to it. In this case, it was clear that the Bs had framed their request using terminology which was not used by the SCS. It would have been reasonable for the SCS to have explained this difficulty to the Bs, and offered advice on re-framing their request. By failing to do so, the SCS failed to comply with section 15 of FOISA.
27. In such cases, the Commissioner would normally require the public authority to remedy this failure by providing the applicant with advice and assistance. However, in this case, the SCS has confirmed that court proceedings are not recorded, and it does not hold a record of what was spoken to at the hearing. The Commissioner's understanding is that the SCS therefore does not hold any recorded information which would fully answer request 2, even if the request was re-framed in terminology familiar to the SCS.
28. Under section 17(1) of FOISA, where an authority receives a request for information it does not hold, it must give the applicant notice in writing to that effect. As the SCS did not give the Bs notice to this effect, the SCS failed to comply with section 17 of FOISA.

DECISION

The Commissioner finds that the Scottish Court Service partially complied with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information requests made by Mr and Mrs B.

The Commissioner finds that the SCS correctly applied the exemption under section 37(1)(a)(i) and (iii) of FOISA to the information withheld from Mr and Mrs B in response to their first request.

In respect of the Bs' second request, the Commissioner found that the SCS failed to comply with section 15 of FOISA, by failing to provide reasonable advice and assistance. In failing to provide notice that it did not hold the information, the SCS also failed to comply with section 17(1) of FOISA.

Given that this decision makes it clear that the SCS does not hold the information in question, the Commissioner does not require the SCS to take any further action in relation to these breaches.

Appeal

Should either Mr and Mrs B or the Scottish Court Service 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.

Decision 206/2013
Mr and Mrs B
and the Scottish Court Service



Margaret Keyse
Head of Enforcement
17 September 2013



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
- (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 –

...

- (d) section 37; and

...

15 Duty to provide advice and assistance

- (1) A Scottish public authority must, so far as it is reasonable to expect it to do so, provide advice and assistance to a person who proposes to make, or has made, a request for information to it.

...



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.

...

37 Court records, etc.

(1) Information is exempt information if it is contained in-

(a) a document-

(i) lodged with, or otherwise placed in the custody of, a court for the purposes of proceedings in a cause or matter

...

(iii) created by a court or a member of its administrative staff for the purposes of, or in the course of, such proceedings;

...

and a Scottish public authority holds the information solely because it is contained in such a document.