

# Decision Notice



Decision 207/2011 Mr G and the Scottish Court Service

Allocation of judicial time

Reference No: 201100892

Decision Date: 18 October 2011

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**Kevin Dunion**

Scottish Information Commissioner

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## Summary

Mr G requested from the Scottish Court Service (SCS) information relating to the time spent by certain judges on specified duties between specific dates. The SCS responded by explaining why it did not consider it held the information for the purposes of FOISA. Following a review, Mr G remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the SCS did hold the information for the purposes of FOISA, and required it to respond to the request accordingly.

## Relevant statutory provisions and other sources

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Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) (General entitlement) and 3(2)(a)(i) (Scottish public authorities)

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

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1. On 3 August 2010, Mr G wrote to the SCS requesting, in respect of Lord Eassie, Lady Paton and Lord Bannatyne, the following information for the period between 1 August 2009 and 31 July 2010 :
  - a. How many (a) full and (b) part days each judge had sat in the Court of Session (Inner/Outer House);
  - b. How many (a) full and (b) part days each judge had sat in the High Court of Justiciary (HCJ) or the HCJ Appeal Court;
  - c. How many (a) full and (b) part writing days each judge had been allowed in relation to his/her work in the Court of Session;
  - d. How many (a) full and (b) part days each judge had been excused from judicial duties (sitting in Court or “writing”) in order to participate in (i) hearings by the Judicial Committee of the Privy Council (JCPC) and (ii) other non-judicial functions.



Mr G also asked for the financial cost to the SCS of participation by each of the above judicial office holders in the JCPC.

2. The SCS responded on 30 August 2010, by giving Mr G notice (in terms of section 17 of FOISA) that it did not hold the information he had requested. It considered the information to be held on behalf of the Lord President (who is not a Scottish public authority in terms of FOISA). It explained that the allocation of judicial duties, and the release of judges from those duties, was an aspect of the Lord President's responsibility for managing the disposal of business in the Supreme Courts.
3. On 21 October 2010, Mr G wrote to the SCS requesting a review of its decision. He did not accept the SCS's rationale for refusing his request.
4. The SCS notified Mr G of the outcome of its review on 18 November 2010, confirming its original decision without modification.
5. On 17 May 2011, Mr G wrote to the Commissioner, stating that he was 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.
6. The application was validated by establishing that Mr G 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

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7. On 16 August 2011, the SCS was notified in writing that an application had been received from Mr G and given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). It was asked to respond to specific questions, including why it did not consider any relevant information in its possession to be held by it for the purposes of FOISA.
8. The SCS provided its submissions on 15 September 2011, explaining the systems used to record information in its Rolls Department. The SCS clarified the extent to which it considered the information recorded to be capable of addressing Mr G's questions, while explaining why it considered the information to be held on behalf of the Lord President (rather than by the SCS in its own right) for the purposes of FOISA. Consequently, it considered section 3(2)(a)(i) of FOISA to apply.
9. The relevant submissions obtained from both Mr G and the SCS will be considered further in the Commissioner's analysis and findings below.



## Commissioner's analysis and findings

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10. In coming to a decision on this matter, the Commissioner has considered the submissions made to him by both Mr G and the SCS and is satisfied that no matter of relevance has been overlooked.

### Whether information is held on behalf of the Lord President

11. Section 1(1) of FOISA creates a general right of access to recorded information held by a Scottish public authority, except where that right is disapplied by the application of one of the exemptions in Part 2 of FOISA, or another provision in Part 1 of FOISA.
12. Section 3(2)(a)(i) of FOISA makes it clear that if a Scottish authority holds the information on behalf of another person, then the information is not held by the authority for the purposes of FOISA.
13. In his application to the Commissioner, Mr G maintained that the SCS held information falling within the scope of his request and disagreed with its rationale for taking a contrary view.
14. The SCS described its functions under the Judiciary and Courts (Scotland) Act 2008<sup>1</sup> (the 2008 Act). Under the 2008 Act, the Lord President (as Head of the Scottish Judiciary) is responsible for making and maintaining arrangements for securing the efficient disposal of business in the Scottish courts. While the SCS has a duty to provide administrative support for the Scottish courts and judiciary – and specifically has the function of providing, or ensuring the provision of, the property, services and staff required for the purposes of the Lord President in carrying out his functions as Head of the Scottish Judiciary – it does not itself have any judicial function.
15. The SCS argued that the Keeper of the Rolls, in carrying out the function of supporting the programming of business in the Court of Session and the High Court of Justiciary (including the deployment of judges), was supporting the courts in the management of their business and therefore in the exercise of their judicial functions. In this capacity, therefore, it considered the Keeper to be acting under the delegated authority of the judiciary, and in particular of the Lord President, being accountable to the Lord President from week to week for the allocation of court business and the deployment of judges.
16. The SCS went on to acknowledge, however, that the database maintained by the Keeper of the Rolls would have enabled it to answer the majority of Mr G's questions in relation to the time spent by the judges on specified activities, the exception being that it could not identify the reasons why judges were unavailable by virtue of other official duties (for example, sitting in the JCPC). It noted, however, that Lord Bannatyne was not a member of the JCPC. It also noted that it did not hold information which could answer the question relating to costs.

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<sup>1</sup> <http://www.legislation.gov.uk/asp/2008/6/contents>



17. The Commissioner has considered carefully both Mr G's submissions and those received from the SCS. He acknowledges that under section 2(2)(a) of the 2008 Act, the Lord President (as Head of the Scottish Judiciary) is responsible for making and maintaining arrangements for securing the efficient disposal of business in the Scottish Courts. It might be argued that these arrangements included the functions of the Keeper of the Rolls.
18. The SCS appears to accept, however, that the Keeper's Office (including the Keeper) is part of the SCS. (The Commissioner notes that, in a leaflet published by the SCS, "About the Scottish Court Service", the Office of the Keeper of the Rolls is described as a department of the SCS.<sup>2</sup>) Under section 62(1)(a) of the 2008 Act, the provision of support (property, services and staff) to the Lord President as Head of the Scottish Judiciary is a specific function of the SCS. That would appear to the Commissioner to include support of the kind provided by the Keeper of the Rolls, as described in the SCS's submissions. While the SCS considers that the programming of court business is a "judicial" function, the Commissioner takes the view that the programming of court business can more accurately be described as an "administrative" function.
19. The Commissioner also notes that none of the SCS's functions are excluded from the ambit of FOISA, paragraph 18 of Schedule 3 to the 2008 Act adding the SCS to Schedule 1 of FOISA without any qualification.
20. In the circumstances, the Commissioner cannot accept the SCS's contention that information held for the purposes of a specific function in its own founding legislation is held on behalf of another person and therefore (by virtue of section 3(2)(a)(i) of FOISA) is not held by it for the purposes of FOISA. He also notes from the SCS's submissions that it would appear, as a matter of fact, to hold information falling within the scope of Mr G's request. In all the circumstances, the Commissioner has concluded that the information is held by the SCS as a Scottish public authority.
21. The SCS should, therefore, consider what information it held at the time it received Mr G's request which fell within the scope of that request. It should then either provide Mr G with the information or, to the extent that it considers itself entitled to do so, refuse to do so under applicable provisions in Part 1 of FOISA. Mr G should be given appropriate notice under Part 1 in respect of any information not provided. The SCS should also give Mr G notice in terms of section 17 of FOISA in respect of any of the requested information it did not hold at the relevant time.

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<sup>2</sup> [http://www.scotcourts.gov.uk/library/publications/docs/The\\_Scottish\\_Court\\_Service.pdf](http://www.scotcourts.gov.uk/library/publications/docs/The_Scottish_Court_Service.pdf)



## DECISION

The Commissioner finds that the Scottish Court Service (SCS) failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr G.

The Commissioner does not accept the SCS's argument that (by virtue of section 3(2)(a)(i) of FOISA) any information held by it and falling within the scope of Mr G's request was held on behalf of the Lord President and therefore was not held by it for the purposes of FOISA.

Given that the SCS acknowledges that it holds information which would fall within the scope of Mr G's request if not deemed to be held on behalf of the Lord President, the Commissioner therefore requires the SCS to respond to the request in accordance with Part 1 of FOISA, on the basis that it holds the information for the purposes of FOISA. He requires the SCS to do this by 5 December 2011.

## Appeal

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Should either Mr G 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 notice.

**Kevin Dunion**  
**Scottish Information Commissioner**  
**18 October 2011**



## Appendix

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### 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.

...

##### 3 Scottish public authorities

...

- (2) For the purposes of this Act but subject to subsection (4), information is held by an authority if it is held-

(a) by the authority otherwise than-

- (i) on behalf of another person; or

...