

Decision Notice

Decision 224/2016: Mr X and the Scottish Courts and Tribunals Service

Moorov Doctrine

Reference No: 201600565

Decision Date: 24 October 2016



Scottish Information
Commissioner

Summary

On 19 July 2015, Mr X asked the Scottish Courts and Tribunals Service (SCTS) for information concerning the Moorov Doctrine (part of the Scots law of criminal evidence).

On review, SCTS withheld the information requested on the basis that it was otherwise accessible and therefore exempt from disclosure. It highlighted a specific report it believed Mr X might find useful, with information on where this could be obtained. Mr X remained dissatisfied and applied to the Commissioner for a decision in relation to this report.

The Commissioner investigated and found that SCTS was not entitled to claim that the information in the report was otherwise accessible. She required SCTS to provide Mr X with the information.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(a) and (2)(a) (Effect of exemptions); 25 (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 19 July 2015, Mr X made a request for information to SCTS. The information requested was the documents the court held in relation to the Moorov Doctrine (part of the Scots law of criminal evidence) and the criteria that must be satisfied before Moorov can be used to corroborate when no evidence is there.
2. Mr X wrote again to SCTS on 13 August 2015, confirming his request was for all the information held on the Moorov Doctrine and highlighting that his original request had been submitted on 19 July 2015.
3. SCTS responded on 26 August 2015, informing Mr X that it did not hold information on the Moorov Doctrine.
4. On 22 September 2015, Mr X wrote to SCTS, requesting a review of its decision on the basis that he believed it must hold the information requested.
5. SCTS wrote to Mr X on 2 October 2015, setting out its understanding of the matters he wished reviewed under FOISA. This letter did not provide a response to his requirement for review.
6. On 24 November 2015, Mr X wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA as he was dissatisfied with SCTS's failure to provide the information requested. The Commissioner subsequently issued *Decision 045/2016 Mr M and the Scottish Courts and Tribunals Service*¹, finding that SCTS had failed to respond to Mr X's requirement for review within the required timescale.

¹ <http://www.itspublicknowledge.info/ApplicationsandDecisions/Decisions/2016/201502253.aspx>

7. During that investigation, on 11 February 2016, SCTS provided Mr X with a review outcome, apologising for its earlier failure to respond. Modifying its original decision, it notified him, in terms of section 25 of FOISA, that it considered information it held on the Moorov Doctrine reasonably obtainable other than by requesting it under section 1(1) of FOISA. SCTS highlighted a specific report published by Scottish Law Commission (SLC) that it considered Mr X might find useful, giving details of where this publication could be accessed or obtained (electronically and in hard copy).
8. On 21 March 2016, Mr X again wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. His application focused specifically on the report highlighted by SCTS. Mr X stated he was dissatisfied with the outcome of SCTS's review because the SLC report was not accessible to him, due to his personal circumstances as a prisoner: he did not have internet access or the financial means to purchase a copy of the report.

Investigation

9. The application was accepted as valid. The Commissioner confirmed that Mr X made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to her for a decision.
10. On 12 April 2016, SCTS was notified in writing that Mr X had made a valid application and the case was allocated to an investigating officer.
11. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. SCTS was invited to comment on this application and answer specific questions, seeking submissions on any provisions of FOISA it considered applicable to the information requested.
12. In particular, SCTS was asked to justify its reliance on section 25(1), with an overview of how and where the SLC report could reasonably be obtained by Mr X.
13. Mr X was also asked for his comments during the investigation. The submissions received from both parties are considered further below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of relevant submissions, or parts of submissions, made to her by both Mr X and SCTS. She is satisfied that no matter of relevance has been overlooked.

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.

Information under consideration

15. In his application to the Commissioner, Mr X was dissatisfied that SCTS had failed to provide him with a copy of the SLC *Report on Similar Fact Evidence and the Moorov Doctrine* (Scot Law Com No. 229) highlighted in its review outcome, which he did not accept was otherwise accessible in terms of section 25(1) of FOISA.

16. Mr X highlighted the current cost of purchasing a hard copy of the SLC report. This figure included the cost of a separate, but associated, discussion paper. As the discussion paper was not identified in Mr X's application, it cannot be considered within the scope of this investigation. Having considered that application carefully, the Commissioner is satisfied that it is confined to the information in the SLC report.
17. SCTS was asked to confirm whether it held a copy of the SLC report. It confirmed that it did.
18. SCTS was concerned that Mr X was under the impression that there was a specific written formulation of the Moorov Doctrine it was refusing to provide. It explained that the Moorov Doctrine was a feature of common law, developed, applied and redefined by the judiciary in successive court cases since the case of *Moorov v HMA* in 1930. SCTS stated that many of these cases had been publicly reported, either by legal publishers or on its own website but, to the best of its knowledge, there was no single specific or definitive formulation of the Doctrine.
19. Accordingly, SCTS considered the simple answer to Mr X's request was that the Moorov Doctrine was not held by SCTS, or indeed anyone else, in terms of section 17 of FOISA.
20. SCTS acknowledged, however, that information on the Moorov Doctrine did exist, in legal text books and in individual court cases where the application of the Moorov Doctrine had been discussed.
21. SCTS explained that its reference to the SLC report was intended to be a helpful direction to a relevant recent publication on the subject, based on the personal knowledge of its staff. SCTS stressed that while the report discussed a range of cases in which the Moorov Doctrine had been developed, it should not necessarily be viewed as containing a definitive account of the Moorov Doctrine, nor should it be seen to hold elevated status over commercially published textbooks or specific court cases. SCTS did not consider it appropriate to advise Mr X on the "best" source of information on the Moorov Doctrine, even if it were qualified to do so.
22. The Commissioner acknowledges that SCTS may not be in a position to provide the kind of guidance referred to in the previous paragraph, and that it provided some relevant contextual information in responding to Mr X's requirement for review. However, Mr X did not ask for guidance on the definitive, or "best" sources of information on the Moorov Doctrine. He asked for any information SCTS held in relation to the Doctrine and criteria for its application. In his application to the Commissioner, he narrowed that to the specific SLC report identified by SCTS. The Commissioner appreciates SCTS's concern that Mr X should not be confused or misled, but there is no reason in this case to look beyond the SLC report – information SCTS acknowledges that it holds (and held, on receipt of Mr X's request).

Section 25(1) of FOISA – Information otherwise accessible

23. 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 is absolute, in that it is not subject to the public interest set out in section 2(1)(b) of FOISA.
24. SCTS submitted that the SLC report comprised published information, which it considered to be exempt under section 25(1) of FOISA.

25. In its review outcome, SCTS informed Mr X that the SLC report was available via the SLC website and provided him with a hyperlink to access that information online <http://www.scotlawcom.gov.uk/>. It also provided him with contact details (postal, telephone, fax and email) for The Stationery Office (TSO), from which he could also obtain a copy of the report.
26. In his application to the Commissioner, Mr X argued that while the report might be publicly available online, free of charge, he did not have internet access. With regard to obtaining a hard copy of the report from TSO, Mr X had obtained the purchase cost of this publication, submitting he did not have the financial means to purchase a copy. In the circumstances, he did not accept that the report was reasonably obtainable by him, in terms of section 25(1).
27. SCTS was asked to explain why it had not provided Mr X with a copy of the report, but rather directed him to sources which might not be considered reasonably accessible to him, given his incarceration in a prison establishment.
28. In response, SCTS referred to paragraph 10 of the Commissioner's guidance on section 25 of FOISA²:

Information which is held by the public authority, but which is also commercially available, such as Ordnance Survey maps, journals or books, is covered by this exemption. The market price for this type of information will generally be taken as "reasonable".

SCTS submitted that it was not in the public interest for public authorities to be obliged to provide targeted extracts of third party, readily available material, that it held on specific subjects.

29. SCTS acknowledged that Mr X's incarceration could have a bearing on what was "reasonably obtainable" to him, noting the cost of obtaining the document in hard copy from TSO. It suggested alternative ways in which he might be able to obtain the information sought, namely through an approach to the prison library or via a process for requesting information from online publications through the prison.
30. Noting these suggestions, the investigating officer asked SCTS to evidence exactly how and from where Mr X could reasonably obtain this information, either free of charge or at a reasonable cost. Having sought clarification from Mr X, the investigating officer confirmed Mr X's understanding that the information was not obtainable from the prison library and could not be obtained as a download via the prison.
31. SCTS was of the understanding that prisoners might request the Prison Service to purchase publications on their behalf, providing the prisoner had sufficient funds in their account to pay for the purchase.
32. SCTS took the view that it could not reasonably be expected to:
 - (i) Research the extent of information available at the prison library, or assess additional possible sources of information available to prisoners beyond those already highlighted.
 - (ii) Assess the financial situations of individual requesters, or their ability to purchase commercially available information, particularly where the information requested originated from a third party source.

² <http://www.itspublicknowledge.info/Law/FOISA-EIRsGuidance/section25/Section25.aspx>

- (iii) Take a view on the market value of third party publications. If a view were taken that the published cost for a specific publication was too high for it to be considered “reasonably available” to a person due to their personal financial circumstances, SCTS believed this could bear significant consequences.

33. SCTS concluded that handling requests for such information from individuals without internet access claiming an inability to pay, without the ability to rely on section 25 of FOISA, would create a potentially significant burden on any Scottish public authority holding commercially available publications for reference purposes.

The Commissioner’s view

34. The Commissioner has considered all of the relevant submissions in this case.

35. The information under consideration (i.e. the information in the SLC report) is held by SCTS.

36. In this case, the Commissioner must consider whether the information is reasonably available to the individual requesting the information, i.e. Mr X. She must take account of the fact that his personal circumstances of incarceration clearly have a bearing on what is reasonably obtainable by him. He cannot, for example, access information on the internet. The alternative means of accessing the information suggested by SCTS, apart from purchasing a hard copy from TSO, appear to be pure conjecture: these cannot be given any weight by the Commissioner.

37. Considering the accessibility of the information to the public in general, the Commissioner notes that the report is publicly available online, free of charge, to those with internet access. She also notes that a hard copy of the report can be purchased via TSO, at the current market price. The Commissioner accepts SCTS’s contention that, in general, a Scottish public authority cannot reasonably be expected to assess whether the market price of a particular published document is within the means of a particular applicant, as part of its consideration of whether the information in that document is reasonably obtainable for the purposes of section 25(1). As the Commissioner’s guidance says, the market price for this type of information will generally be taken as “reasonable”.

38. In the case of the report under consideration here, however, there is a means of obtaining the information free of charge, which can be exercised by the majority of individuals but not, in his particular circumstances, by Mr X. They can download the document, and thus obtain the information, from the internet. There would appear to be no restriction on doing this, subject to observing copyright and reuse requirements. The means by which the information is most reasonably obtainable by most people is not, therefore, available to Mr X.

39. In all the circumstances, the Commissioner is not satisfied that the information in the SLC report is reasonably obtainable by Mr X in the way that it is reasonably obtainable by the majority of individuals. Mr X is placed at a clear disadvantage (in comparison with those others) in obtaining the information other than by requesting it under section 1(1) of FOISA, and the Commissioner does not believe it to be the intention underlying section 25(1) of FOISA that such a disadvantage should be created by applying it. Given that this would be the effect of applying section 25(1) in this case, the Commissioner is not satisfied that SCTS was entitled to do so here.

40. The Commissioner therefore finds that SCTS was not entitled to apply section 25(1) to the information requested by Mr X (i.e. the SLC report). She requires SCTS to provide Mr X with the information in that report.

41. The Commissioner does not require SCTS to provide Mr X with a copy of the associated discussion paper, given that this does not fall within the scope of his application.
42. Incidentally, the Commissioner has been given no reason why SCTS cannot simply print off and provide a downloaded copy of the report, and that is what she presumes SCTS will do. In that case (even if it were relevant to the application of this particular exemption, which she does not accept) she fails to see – and it has not been explained to her – what “significant burden” compliance would create for the authority.

Decision

The Commissioner finds that the Scottish Courts and Tribunals Service (SCTS) failed to comply with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr X.

The Commissioner finds that SCTS was not entitled to apply section 25(1) of FOISA to the information sought by Mr X (namely the information in the Scottish Law Commission report).

The Commissioner therefore requires SCTS to provide Mr X with a copy of the Scottish Law Commission Report on Similar Fact Evidence and the Moorov Doctrine (Scot Law Com No. 229) by **8 December 2016**.

Appeal

Should either Mr X or the Scottish Courts and Tribunals Service 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.

Enforcement

If the Scottish Courts and Tribunal (SCTS) fails to comply with this decision, the Commissioner has the right to certify to the Court of Session that SCTS has failed to comply. The Court has the right to inquire into the matter and may deal with [public authority] as if it had committed a contempt of court.

Margaret Keyse
Head of Enforcement

24 October 2016

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 –

(a) section 25;

...

25 Information otherwise accessible

(1) Information which the applicant can reasonably obtain other than by requesting it under section 1(1) is exempt information.

(2) For the purposes of subsection (1), information-

(a) may be reasonably obtainable even if payment is required for access to it;

(b) is to be taken to be reasonably obtainable if-

(i) the Scottish public authority which holds it, or any other person, is obliged by or under any enactment to communicate it (otherwise than by making it available for inspection) to; or

(ii) the Keeper of the Records of Scotland holds it and makes it available for inspection and (in so far as practicable) copying by,

members of the public on request, whether free of charge or on payment.

(3) For the purposes of subsection (1), information which does not fall within paragraph (b) of subsection (2) is not, merely because it is available on request from the Scottish public authority which holds it, reasonably obtainable unless it is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.

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