

Decision Notice



Decision 150/2008 Mr W and the Scottish Court Service

Regulations, Rules of Court and procedures

Reference No: 200801553

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Scottish Information Commissioner

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Summary

Mr W requested from the Scottish Court Service (SCS) copies of regulations and rules of court, along with advice regarding a particular case. The SCS responded by providing a copy of the requested regulations, while declining to provide advice. Following a review, during which Mr W was informed under section 17 of FOISA that information was not held, Mr W remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, during which the SCS also claimed some of the information to be exempt in terms of section 25(1) of FOISA, the Commissioner found that the information requested was either not held or exempt in terms of section 25(1) of FOISA in that it was otherwise accessible to the applicant.

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)(a) (Effect of exemptions); 8 (Requesting information); 17(1) (Notice that information is not held); 20(4) and (5) (Review by Scottish public authority) and 25(1) (Information otherwise accessible)

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 16 September 2008, Mr W (responding to a letter he had received on 12 September 2008) wrote to the Sheriff Clerk Depute in Aberdeen requesting the following;
 - a. “a copy of the applicable Regulations and/or Rules of Court to which you refer”; and
 - b. “I should also be grateful if you would point me in the direction of any procedure by which I may invite the Sheriff to seek a preliminary ruling from the European Court of Justice (ECJ) as to the justiciability of post-Amsterdam TEU questions of the EC/EU Law relative to the election of the European Parliament.”



2. The Sheriff Clerk Depute responded on 18 September 2008, providing Mr W with a copy of the Representation of the People (Scotland) Regulations 2001. While this response made no mention of the Rules of Court it did inform Mr W that the Sheriff Court staff were not legally qualified to provide the advice requested at point 1b above.
3. On 22 September 2008, Mr W wrote to the SCS requesting a review of its decision. In particular, Mr W stated that he believed the authority held the information he had requested and that the response had not sought to rely upon an exemption pursuant to FOISA.
4. The SCS notified Mr W of the outcome of its review on 23 October 2008. The SCS informed Mr W that his request for information had been dealt with by the Sheriff Clerk Depute in Aberdeen as an officer of the Court (which is not itself a public authority for the purposes of FOISA) in that he was dealing with an ongoing case before the Court. The SCS noted that Mr W's letter of 22 September 2008 had clarified his intention that the request was to the SCS and as a result it had carried out a review.
5. The SCS informed Mr W that the Rules of Court which he had requested at point 1a above were set out in three Acts of Sederunt, which it stated were publicly available. It provided full citations for these and directed Mr W to where they could be obtained by him. The SCS took the view that since this information was contained within legislation, it did not hold the information in terms of section 17 of FOISA.
6. In relation to the request set out at point 1b above, the SCS stated that it had interpreted this be a question of whether the SCS held a "recorded" procedure for the process described. The SCS confirmed that it did not hold such a procedure and again responded in terms of section 17 of FOISA.
7. On 28 October 2008, Mr W 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. In particular, Mr W questioned the use of section 17 of FOISA, suggesting in particular that the Rules of Court were in fact held by the authority, and submitted that even where the Sheriff Clerk Depute could not provide further information as an officer of the Court, he remained an employee of the SCS and therefore should have considered whether the request fell to be dealt with under FOISA.
8. The application was validated by establishing that Mr W 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

9. On 6 November 2008, the SCS was notified in writing that an application had been received from Mr W and was 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 and in particular to justify its use of section 17 of FOISA.
10. The SCS responded on 26 November 2008, confirming that the Sheriff Clerk Depute was both an officer of the Court (which is not covered by FOISA) and an employee of the SCS, which is covered by FOISA. It submitted that Mr W's letter of 16 September was addressed to the Sheriff Clerk Depute at Aberdeen Sheriff Court and had been sent to him in his capacity as an officer of the Court. It took this view as "the content of the letter related to an existing court case and was clearly written in response to a decision of the Court sent to Mr W on 12 September, as well as being part of an ongoing exchange of correspondence with the Court".
11. The SCS continued that it was normal for Sheriff Court staff to have this type of correspondence with a litigant. Because of their unrepresented status, party litigants such as Mr W would often correspond with courts seeking views, advice or information in relation to cases or potential cases. However, staff working in courts could not enter into discussions with party litigants on anything which might be construed as legal advice and were always cautious to ensure this could not happen. The SCS suggested that it was unlikely that a lawyer would contact Sheriff Court staff with a request like that made by Mr W, but if one did the response would be the same. In the circumstances, it was contended by the SCS that the Sheriff Clerk Depute had been entirely correct to respond to Mr W's letter as an officer of the Court and outwith the scope of FOISA.
12. In support of this position, the SCS stated that there was nothing in Mr W's letter to suggest that he was expecting anything other than a response from the Sheriff Clerk Depute in his capacity as an officer of the Court, or that he was looking for information held by the SCS. Following this line of argument, the SCS took the view that Mr W's letter of 22 September 2008 had not been a valid request for review, since his initial request could not be deemed to have been a request under FOISA. However, in order to be helpful to Mr W it had treated the second letter as if it were a valid review request and responded to it accordingly.
13. The SCS also acknowledged that within the response to Mr W's request for review it should have cited section 25(1) of FOISA rather than section 17. While apologising for this omission, it pointed out that Mr W had been directed to where he could obtain the information and therefore had not been disadvantaged in any way.



Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has consider all of the submissions made to him by both Mr W and the SCS and is satisfied that no matter of relevance has been overlooked.
15. On 12 September 2008, the Sheriff Clerk Depute at Aberdeen wrote to Mr W in relation to an ongoing case. Mr W's request dated 16 September 2008, on which this investigation is founded, was headed with the subject matter of that ongoing case and the case reference number. The request referred back to the letter of 12 September and was clearly written in response to that earlier letter. In the circumstances, the Commissioner accepts that it was reasonable for the Sheriff Clerk Depute to deal with the letter as he would with any other case related correspondence. Within that context and in response to the request at 1a above, the Sheriff Clerk Depute provided Mr W with a copy of the Representation of the People (Scotland) Regulations 2001, while declining to offer advice in response to the request at point 1b (understanding it to be a request for advice rather than information).
16. Mr W asks whether, having responded to his letter as an officer of the Court, the Sheriff Clerk Depute should also have treated his letter as a request under section 1 of FOISA as an employee of the SCS. This distinction, while referred to in the arguments advanced by both Mr W and the SCS, appears in the circumstances to be somewhat artificial.
17. In *Decision 154/2006 Mr T and Highland Council*, in which the Commissioner considered whether a request for information addressed to the Depute Clerk or Clerk of the District Court amounted to a request under FOISA to the Council employing the official in question, the Commissioner accepted that *"the Clerk to the District Court will have certain duties to the Court in addition to duties directly owed to his/her employer. The Clerk is a lawyer, however, and it is not unusual for lawyers or, for that matter, other professionals to have professional responsibilities in addition to the responsibilities of an employee. Such responsibilities do not diminish their employment status. Both the Clerk and the Depute Clerk of the District Court are employed by the Council to do that job (perhaps along with other functions) and are accountable to their employer for the performance of that employment in much the same way as any other employee, whatever duties may be owed elsewhere. Similarly, a Sheriff Clerk, Clerk of Session or Justiciary Clerk will owe duties to the Court he or she services, but will remain a Civil Servant within the Scottish Court Service subject to Civil Service codes of conduct."*
18. In that case, the Commissioner was satisfied that although the Clerk and Depute Clerk had duties to the Court, ultimately they were employees of the Council and accountable in terms of their performance to the Council. In the circumstances of that case, he was satisfied that the request to the Clerk or Depute Clerk to the District Court was a request to a public authority and therefore should have been treated as a request under FOISA.



19. In this case, the relationship between a Sheriff Clerk and the SCS is similar in that the Sheriff Clerk Depute is an employee of the SCS and functions as an officer of the Court because he is employed as a Clerk by the SCS. In the circumstances, the Commissioner would consider the request made by Mr W to have been made to the SCS. There appears to be a further question raised by the submissions in this case, however, and that is whether the request should have been considered as a request for information under FOISA at all, leaving aside questions as to the status of the intended recipient. Again, somewhat artificial distinctions appear to be being made here.
20. This particular case can be distinguished from that which led to *Decision 154/2006* in that here the initial request for information did not make specific reference to FOISA. On the other hand, there is nothing in FOISA stipulating that it had to. Section 8 of FOISA sets out the required content of a valid request under section 1 of FOISA and all of these requirements were met by Mr W's letter of 16 September 2008. The request was in writing, stated Mr W's name and an address for correspondence and described the information he was requesting.
21. The Commissioner recognises that there will always be a good deal of correspondence which passes routinely between members of the public and Scottish public authorities, in the course of which information may be requested from the authorities by those members of the public. Correspondence between the Sheriff Clerk's office and litigants in particular cases, for example, would have been seen as routine business correspondence before FOISA came into force and generally it is perfectly reasonable for it to continue to be dealt with as such. Where information is requested in the course of such correspondence, there will be many cases in which it is possible to deal with the request without active consideration of the requirements of FOISA and certainly it was never intended that FOISA should inhibit the effective conduct of business of this kind.
22. It does not follow, however, that requests for information submitted in the course of correspondence of this kind are somehow exempt from the requirements of FOISA. If an applicant is dissatisfied with the response received to such a request, the rights available under Part 1 of FOISA remain.
23. In this case, the Sheriff Clerk Depute appears to have interpreted Mr W's request in a certain way and gone on to provide a response based on that interpretation. It appears clear from the response that at that point Mr W's letter was understood to contain a request for information only insofar as it sought a copy of "the applicable Regulations and/or Rules of Court". Given that no information appears to have been consciously withheld, there was no requirement to refer to FOISA or any particular provisions of FOISA in the response, or to advise Mr W of his right to seek a review if he was dissatisfied with it. While it may in other circumstances be good practice to advise applicants of their rights under FOISA even where the authority believes itself to be making a full disclosure, it would appear unreasonable to expect the provision of such details in every case where information is provided (as here) in the routine course of correspondence. In any event, Mr W does not appear to have been inhibited in any way from exercising his right to seek a review from the SCS and the Commissioner is unable in the circumstances to identify any particular way in which the response provided to Mr W was not compliant with Part 1 of FOISA.



24. Having received Mr W's request for review, the SCS dealt with it as such. It provided further information in response to the first part of his request for information and, having reconsidered its initial interpretation of the second part, confirmed that it did not hold any relevant procedure. The substance of these responses will be considered further below, but the Commissioner is satisfied in the circumstances that the SCS letter of 23 October 2008 represented a technically appropriate outcome to the review process in terms of section 21(4) and (5) of FOISA and does not consider it necessary to comment further on this aspect of the case.

Section 17 – Notice that information is not held

25. In order to determine whether the SCS was correct to give Mr W notice under section 17(1) of FOISA that it did not hold the information he was seeking, the Commissioner must be satisfied that at the time of Mr W's request the SCS did not hold the information he was seeking.
26. In relation to the second part of Mr W's request set out at point 1b above, the SCS stated in responding to his request for review that they had understood this as asking whether the SCS held a "recorded" procedure for the process described. The Commissioner accepts that this is the only reasonable interpretation that could have been put on this part of the request in order for it to be considered to be a request for information under FOISA. The SCS confirmed that no such recorded procedure was held and cited section 17 of FOISA.
27. In responding to the Commissioner, the SCS further explained that for the SCS Court staff to attempt to answer Mr W's question on any relevant procedure would constitute providing legal advice and as such compromise the impartiality of staff in carrying out their duties to the Court. The SCS continued that this was not a routine matter, that no such procedure was held, and consequently that Mr W would have to form his own view based on the legislation and precedent, or obtain legal advice.
28. The only matter falling within the Commissioner's remit in this connection is whether the SCS held a procedure of the kind sought by Mr W at the relevant time. Having considered the submissions made by the SCS, he is satisfied in the circumstances that it did not and therefore that, to that extent, it was correct to give Mr W notice in terms of section 17(1) of FOISA.

Section 25(1) – Information otherwise accessible

29. Section 25(1) of FOISA provides that information which the 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 and therefore the Commissioner is not required to apply the public interest test contained in section 2(1)(b) of FOISA.
30. Concerning Mr W's argument that the SCS should be deemed to hold the Acts of Sederunt containing the relevant Rules of Court, the SCS confirmed in its submissions to the Commissioner that it should in fact have cited section 25(1) of FOISA, the information in question being otherwise accessible. It went on to argue that such an omission had not disadvantaged Mr W in any way, as he had been told he could obtain them from the Stationery Office and had been provided with a postal address, website details for on-line purchase and details of where they could be accessed on-line.



31. In this case, it does not appear to be disputed by Mr W that these are the relevant Rules of Court (which they appear to be in any event). While agreeing (given its nature) that the SCS must be considered to have held the information in question, the Commissioner accepts the SCS position that they were reasonably obtainable by the applicant other than requesting them under section 1(1) of FOISA: at least some of the means identified by the SCS could be used by Mr W. In the circumstances, the Commissioner is inclined to accept the SCS's contention that Mr W was guided to where he could access the information and therefore suffered no detriment as a consequence of any failure to cite section 25(1) at an earlier stage. He does not, therefore, require the SCS to take any further action.

DECISION

The Commissioner finds that the Scottish Court Service acted in accordance with Part 1 of the Freedom of Information (Scotland) Act 2002 (FOISA) in responding to the information request made by Mr W.

Appeal

Should either Mr W 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.

Margaret Keyse
Head of Investigations
8 December 2008

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 –

- (a) section 25;

...

8 Requesting information

- (1) Any reference in this Act to "requesting" information is a reference to making a request which-

- (a) is in writing or in another form which, by reason of its having some permanency, is capable of being used for subsequent reference (as, for example, a recording made on audio or video tape);

- (b) states the name of the applicant and an address for correspondence; and

- (c) describes the information requested.

- (2) For the purposes of paragraph (a) of subsection (1) (and without prejudice to the generality of that paragraph), a request is to be treated as made in writing where the text of the request is-

- (a) transmitted by electronic means;

- (b) received in legible form; and

- (c) capable of being used for subsequent reference.

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.

21 Review by Scottish public authority

...

- (4) The authority may, as respects the request for information to which the requirement relates-
- (a) confirm a decision complained of, with or without such modifications as it considers appropriate;
 - (b) substitute for any such decision a different decision; or
 - (c) reach a decision, where the complaint is that no decision had been reached.
- (5) Within the time allowed by subsection (1) for complying with the requirement for review, the authority must give the applicant notice in writing of what it has done under subsection (4) and a statement of its reasons for so doing.

...

25 Information otherwise accessible

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