

Decision Notice



Decision 010/2011 Mr Keith Knowles and the Scottish Court Service

Audio tapes of Fatal Accident Inquiry

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www.itspublicknowledge.info

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Summary

Mr Keith Knowles asked the Scottish Court Service (SCS) for a copy of the taped proceedings of a specified Fatal Accident Inquiry (FAI). Following a review, the SCS refused to provide him with a copy of the recordings on the basis that they were exempt from disclosure under section 37(1)(a)(iii) of FOISA (this exempts information contained in documents created by a court or by a member of its administrative staff for the purposes of, or in the course of, court proceedings).

During the investigation, the SCS put forward two sets of arguments. Firstly, it argued that it did not hold the information sought by Mr Knowles for the purposes of FOISA, but that it held the information on behalf of the courts. Secondly, it argued that, even if it did hold the recordings for the purposes of FOISA, the recordings were exempt from disclosure under section 37(1)(a)(iii).

The Commissioner found that the SCS did hold the recordings for the purposes of FOISA. However, he was satisfied that the recordings were exempt under section 37(1)(a)(iii) of FOISA, given that they had been created by a member of the court's administrative staff in the course of the FAI.

The Commissioner considered the effect of section 37(3) in relation to Mr Knowles' application. Section 37(3) states that section 37 does not apply to information held by a Scottish public authority *for the purposes of* an FAI. However, the Commissioner accepted the SCS's arguments that the recording was not created *for the purposes of* the FAI, but was, rather, a by product of the proceedings and created instead *in the course of* the FAI.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and 1(6) (General entitlement); 2(1)(a) and 2(d) (Effect of exemptions); 3(2)(a)(i) (Scottish public authorities); 34(2)(a) (Investigations by Scottish public authorities and proceedings arising out of such investigations) and 37(1)(a)(iii), (2) and (3) (Court records, etc)

The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (the FAI Act) section 6(5) (Sheriff's determination etc)

Judiciary and Courts (Scotland) Act 2008 (the 2008 Act) sections 61(1) (Administrative support for the Scottish courts and judiciary) and 63(1), (2)(g) and (3) (Appointments etc. of office holders)

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.



Decision 111/2010 Mr Knowles and the Scottish Court Service

Background

1. On 8 October 2009, Mr Knowles wrote to the SCS requesting a copy of the taped proceedings of a specified FAI.
2. On the same day, a member of SCS staff asked Mr Knowles to telephone him to discuss his request. Mr Knowles did so, and, later that day, emailed the SCS to confirm in writing its refusal to provide the recordings and to provide him with reasons for the refusal.
3. In a subsequent email sent by the SCS later on 8 October 2009, the SCS stated that tapes used to record evidence are never copied or allowed to leave the court building, other than with a Sheriff or a Judge's permission, and only then under secure data-handling controls. No refusal notice was issued to Mr Knowles in terms of FOISA, and it later became clear that, at this stage, the SCS did not consider his request in terms of FOISA.
4. On 27 November 2009, Mr Knowles emailed the SCS again. He referred to what had happened on 8 October 2009, and asked for confirmation that the situation was unchanged, and that his request would not be complied with. The Commissioner considered that this email constituted a requirement for review of the handling of Mr Knowles' request, and in particular of the SCS's failure to either provide the information requested or issue any notice confirming its decision that it was not obliged to do so.
5. The SCS replied to Mr Knowles by email on the same day, stating that the transcription of any court evidence could only be authorised by the presiding Sheriff, who had declined the request.
6. On 12 April 2010, Mr Knowles applied to the Commissioner for a decision on the SCS's failure to conduct an adequate review of his request in line with the procedural requirements of FOISA.
7. The Commissioner notified the SCS that Mr Knowles had made an application and the SCS subsequently carried out a review in terms of FOISA. It notified Mr Knowles of the outcome of the review on 11 June 2010, apologising that his request had not been recognised as a request under FOISA, but advising him that the recordings he sought were exempt from disclosure under section 37(1)(a)(iii) of FOISA.
8. The Commissioner subsequently issued a decision (*Decision 111/2010 Mr Knowles and the Scottish Court Service*¹) in relation to the SCS's failure to comply with the technical requirements of FOISA in dealing with Mr Knowles' request.

¹ <http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2010/201000713.asp>



9. On 1 July 2010, Mr Knowles made a further application to the Commissioner for a decision in terms of section 47(1) of FOISA, as he was dissatisfied that the information he had requested had not been provided to him. Mr Knowles was, therefore, questioning whether the exemption in section 37(1)(c) applied to the recordings.
10. Mr Knowles' application was validated by establishing that he had made an information request 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.

Investigation

11. On 6 July 2010, the SCS was notified in writing that the application had been received and was asked to provide the Commissioner with the information withheld from him (i.e. the taped proceedings of the FAI).
12. In response, the SCS explained that *transcripts* from FAI proceedings can only be made if the residing Sheriff orders so, or if a party with an interest in the FAI makes an application for the recording of evidence to be transcribed and pays the relevant fee. (This is in line with section 6(5) of the FAI Act. The decision as to whether a party has an interest in the FAI will usually be made by the Sheriff who presided at the FAI; there is no automatic right to require that a recording be transcribed.) The SCS advised that as the Sheriff, in these proceedings, had refused to extend the notes and no party of interest had applied and paid for the transcripts, there were no transcripts for the SCS to provide the Commissioner.

Clarification of Mr Knowles' request

13. At this stage, the investigating officer asked Mr Knowles to confirm whether he sought a copy of written transcripts or of the audio tapes. Mr Knowles confirmed that he sought the audio recordings as opposed to a written transcript.
14. From correspondence seen by the Commissioner, it is clear that Mr Knowles is aware of the route by which a party with an interest in an FAI can apply to obtain a transcript of the recordings under the FAI Act. It is also clear to the Commissioner, having considered the communications between Mr Knowles and the SCS, that Mr Knowles seeks the nuances that the audio recording would offer, as opposed to a written record of events. (The Commissioner has not gone on to consider whether the information sought by Mr Knowles is exempt from disclosure under section 25(1) of FOISA, on the basis that it is information which he can reasonably obtain other than by requesting it under FOISA.)
15. The investigating officer confirmed with the SCS that the Commissioner's investigation would be concerned with the audio recordings as opposed to a written transcript. The SCS was then given an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asked to respond to specific questions.



16. The SCS provided comments on 25 August 2010. Although it had previously advised Mr Knowles that it considered the recordings to be exempt from disclosure under section 37(1)(a)(iii), the SCS now took the view that, in terms of section 3(2)(a)(i) of FOISA, it did not hold the recordings, but actually held the recordings on behalf of the Court. However, the SCS also stated that, should the Commissioner determine that it did hold the information for the purposes of FOISA, it wished to argue that the recordings were exempt from disclosure.
17. During the investigation, additional submissions were sought (and obtained) from the SCS in relation to both section 3(2)(a)(i) and the exemption in section 37(1)(a)(iii).
18. The investigating officer also contacted Mr Knowles during the investigation, seeking submissions on the matters to be considered in the case. Mr Knowles' submissions, along with those of SCS, are summarised and considered (where relevant) in the Commissioner's analysis and findings section below.

Commissioner's analysis and findings

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

Is the information held by the SCS for the purposes of FOISA?

20. The first issue to be addressed is whether the information sought by Mr Knowles is held by the SCS for the purposes of FOISA.
21. Section 1(1) of FOISA gives a right to request information held by a public authority. In terms of section 3(2)(a)(i) of FOISA, information which is held by a public authority on behalf of another person, is not held by the public authority for the purposes of FOISA.
22. The SCS argued that it did not hold the information sought by Mr Knowles for the purposes of FOISA, because it held the information on behalf of the court.
23. It is important to note that, in terms of section 3(1) of FOISA, courts are not public authorities for the purposes of FOISA. Sheriffs, and other members of the judiciary, are entirely independent of the SCS and are therefore not answerable to, or employed by, the SCS. The SCS is, however, under section 61 of the Judiciary and Courts (Scotland) Act 2008 (the 2008 Act) responsible for providing staff, buildings, etc. to support Scotland's courts and the work of the judiciary.
24. As can be seen from section 3(2)(a)(i), the concept of "holding" information for the purposes of FOISA is not simply a question of physical fact. It is possible for an authority to have in its physical possession information which it holds on behalf of another person.



25. The SCS acknowledged that it has, among its statutory functions, a role to support the operations of the courts and the judiciary of those courts.
26. The SCS also accepted that it physically holds the audio recordings which are the subject of Mr Knowles' request. The SCS considered what its responsibility was for those recordings and, with reference to *Decision 56/2006 MacRoberts and the City of Edinburgh Council* and *Decision 008/2005 Mr Shields and the Scottish Parliament*, the SCS came to the view that recordings made in court during a judicial inquiry and under the direction of the court, are held solely on behalf of the court as a court record and solely for safekeeping as part of the legal process.
27. The SCS also argued that the extent of judicial control over any subsequent intromission with the recordings meant that the recordings could not be regarded as being held by the SCS for the purposes of FOISA.
28. In *Decision 008/2005 Mr Shields and the Scottish Parliament*², to which the SCS makes reference, at paragraph 31, the Commissioner stated:

"If an authority holds information on behalf of another person or organisation, it will not control that information in the same way as it would with information held in its own right. The authority would not have power to delete or amend that information without the owner's consent; it would not be able to apply its own policies or procedures to it. It may have restricted access to it."
29. In subsequent decisions (*Decision 160/2006 Mr David M. Paterson and Aberdeenshire Council*³) the Commissioner has also made clear that, although the ability to amend, delete or disclose information is a significant factor which might indicate legal control, it is not a conclusive test. There is a distinction between a situation in which an authority would never have the ability to amend or process information in any way and a situation where an authority holds information in its own right, but is then subject to various contractual or other limitations on what it would otherwise be entitled to do with that information.
30. The tape recording in this case was made by the clerk of court, acting in his capacity as an officer of the court. In terms of section 63(2)(g) of the 2008 Act, sheriff clerks are members of staff of the SCS.
31. Clearly, the purpose of the SCS (including, of course, sheriff clerks) is to provide support services to the court function, and the recordings were created as part of this administrative function. The Commissioner acknowledges that the audio recordings are subject to certain restrictions which are outwith the control of the SCS; he is not, however, satisfied that the points presented by the SCS are conclusive evidence that these recordings are not held for the purposes of FOISA.

²<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2005/200500463.asp>

³<http://www.itspublicknowledge.info/applicationsanddecisions/Decisions/2006/200502967.asp>



32. Although accepting and recognising the important distinction between the SCS and the courts for the purposes of FOISA, the Commissioner considers that the audio recordings in question are created as part of the administrative function of the SCS; they are not documents created by the judiciary and are a mere product and record of an event. As these are created with an administrative intention, the Commissioner cannot accept that these are not held by the SCS for the purposes of FOISA.
33. In coming to this conclusion, the Commissioner has also been mindful of a decision of the Information Tribunal (now known as the First-tier Tribunal (Information Rights)), which considered the position in the remainder of the UK in terms of the Freedom of Information Act 2000 (FOIA).
34. In *The Ministry of Justice v Information Commissioner EA/2007/0120 & 0121*, the Information Tribunal considered two requests for audio recordings of court proceedings. In that case, the Tribunal came to the conclusion that the recordings were documents created by a member of the administrative staff of a court and there was no suggestion from any of the parties involved, or indeed from the Information Tribunal, that the recordings were anything other than held by the Ministry of Justice, which has similar responsibilities in relation to the courts as does the SCS.
35. The Commissioner also notes that, if taken to its logical conclusion, the reference to members of a court's administrative staff in section 37(1)(a)(iii) would not have been considered necessary by Parliament.
36. The Commissioner is therefore satisfied that the tape recordings are held by the SCS for the purposes of FOISA.
37. The Commissioner will now go on to consider whether the recordings are exempt from disclosure under section 37(1)(a)(iii) of FOISA.

Section 37(1)(a)(iii) – Court records, etc.

38. Section 37(1)(a)(iii) of FOISA states that information is exempt information if it is contained in a document created by a court or a member of its administrative staff for the purposes of, or in the course of, proceedings in a cause or matter.
39. Section 37(1) provides that the exemption will only be engaged if the authority holds the information solely because it is contained in a *document*. However, the Commissioner is satisfied, for the reasons given in the Information Tribunal decision *Mitchell v Information Commissioner EA/2005/0002* in relation to the equivalent provision under FOIA, that records of proceedings, whether in paper, electronic or audio tape, are “documents” for the purposes of section 37 of FOISA.
40. Section 37 of FOISA applies to three classes of court document. Sections 37(1)(a)(i) and (ii) relate to documents lodged with the court or served on or by a Scottish public authority and 37(1)(a)(iii) refers to documents created by a court or its administrative staff. The exemption is absolute, in that it is not subject to the public interest test contained in section 2(1) of FOISA.



41. The Policy Memorandum behind the Bill made it clear that section 37 is designed to ensure that existing procedures governing 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. Essentially, the purpose behind section 37 of FOISA, is to ensure that the existing rights of access to such records is not undermined by FOISA.
42. As noted above, a tape recording of the evidence heard before the FAI was made by the sheriff clerk, an employee of the SCS. Given the SCS's function to provide support to the court, the Commissioner is satisfied that the recording was created by a member of its administrative staff in the course of court proceedings in line with section 37(1)(a)(iii) of FOISA.
43. However, as Mr Knowles noted in correspondence with this office, section 37(3) of FOISA states that section 37 exemptions do not apply to information held by a Scottish public authority for the purposes of an FAI. (According to the Explanatory Notes to the Bill, FAIs are excluded from section 37 because of the existence of the more specific exemption in section 34(2)(a) of FOISA, which exempts from disclosure information held for the purposes of an FAI which has not been concluded. The FAI to which Mr Knowles' request relates was concluded at the time he made his request, so the exemption in section 34(2)(a) does not apply here, although see the comments in paragraph 47 below.)
44. Submissions were sought from the SCS on section 37(3). The SCS argued that section 37(3) did not apply to the tape recordings of the evidence of an FAI. The SCS considered that the words, "for the purposes of an inquiry", given their ordinary meaning, apply to information which has been compiled to contribute to the process of discovering the circumstances surrounding the death that is subject of the FAI. That, submitted the SCS, is the purpose of the inquiry.
45. The SCS take the view that the tape recordings of the inquiry is a record of the inquiry, a mere product of its occurrence, but, presumably on the basis that they were made in the process of the proceedings, as opposed to for the purposes of the proceedings, remain within the definition of a court record falling in section 37(1)(a)(iii).
46. In coming to a conclusion as to the effect of section 37(3), the Commissioner has reviewed the Parliamentary debates discussing the relevant parts of sections 34 and 37.
47. The Commissioner notes that, during the debate on section 34(2)(a), the then Justice Minister, Jim Wallace, stated:

"Information collected during the investigations into the cause of the death of a person is invariably sensitive...much of the information collected during an investigation into a cause of death is inappropriate for general public disclosure, given the distress that might be caused...Relatives of a victim will often have legitimate interest in information and it may be entirely appropriate to make that information available in private...That practice will be unaffected by the legislation."



48. Clearly, section 34(2)(a) applies to FAIs which have not been concluded, but, given the legislative intention behind the section, it is difficult to come to the conclusion that section 37(3) should be interpreted as allowing all such information to be placed into the public domain (although other exemptions may apply), simply because the FAI has concluded.
49. The Commissioner also notes that, while section 37(1) deals with information created, etc. “for the purposes of, or in the course of” proceedings, section 37(3) refers only to information held “for the purposes of” an inquiry. This suggests that Parliament, when drafting the legislation, considered that the two aspects, i.e. “for the purposes of” and “in the course of”, were distinct from one another. Indeed, during the course of the Bill, the phrase “in the course of” was a late amendment to the Bill, to ensure that documents created in the course of proceedings, but not necessarily created for the purpose of those proceedings were covered by the section 37 exemption.
50. In the circumstances, the Commissioner accepts the arguments presented by the SCS. He accepts that the audio recording was a product of occurrence of the FAI (as a record of what took place) and that this information can be distinguished from information which was created with the intention of being analysed during the process of the inquiry itself. He is therefore satisfied that the audio recording was created “in the course of” an inquiry instituted under the FAI Act and not “for the purposes” of such an inquiry.
51. The Commissioner is therefore satisfied that section 37(3) does not apply to the audio recordings sought by Mr Knowles and that the audio recordings are exempt from disclosure under section 37(1)(a)(iii) of FOISA on the basis that they were created by a member of the court’s administrative staff in the course of the proceedings.

DECISION

The Commissioner finds that the audio recordings of the FAI in question are exempt from disclosure under section 37(1)(a)(iii) of FOISA and that, in refusing to disclose them to Mr Knowles, the Scottish Court Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002.



Appeal

Should either Mr Knowles or the SCS 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
12 January 2011



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 –

...

- (d) section 37; and

...

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

...



34 Investigations by Scottish public authorities and proceedings arising out of such investigations

...

- (2) Information is exempt information if –
- (a) held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14) but not for the time being concluded; ...

37 Court records, etc.

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

- (2) In this section-
- "court" includes a tribunal or body exercising the judicial power of the State; and
- "inquiry" means an inquiry or hearing held under a provision contained in, or made under, an enactment.
- (3) This section does not apply to information held by a Scottish public authority for the purposes of an inquiry instituted under the Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976 (c.14).



The Fatal Accidents and Sudden Deaths Inquiry (Scotland) Act 1976

6 Sheriff's determination etc.

...

- (5) Upon payment of such fee as may be prescribed in rules made under paragraph (i) of section 7(1) of this Act, any person -
 - (a) may obtain a copy of the determination of the sheriff;
 - (b) who has an interest in the inquiry may, within such period as may be prescribed in rules made under paragraph (j) of the said section 7(1), obtain a copy of the transcript of the evidence,
from the sheriff clerk.

Judiciary and Courts (Scotland) Act 2008

61 Administrative support for the Scottish courts and judiciary

- (1) The SCS has the function of providing, or ensuring the provision of, the property, service, officers and other staff required for the purposes of-
 - (a) the Scottish courts, and
 - (b) the judiciary of those courts.

...

63 Appointments etc. of office holders

- (1) The Scottish Ministers' functions in relation to the officers mentioned in subsection (2) are transferred to the SCS
- (2) Those officers are the holders of the following offices –
 - ...
 - (g) sheriff clerk
 - ...
- (3) Those officers are also members of the staff of the SCS and, accordingly, references in this Act to the staff of the SCS include, except where the context requires otherwise, reference to those officers.