

Decision Notice



Decision 141/2011 Mrs T and the Scottish Ministers

Information relating to how a complaint was handled

Reference No: 201100960
Decision Date: 20 July 2011

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Scottish Information Commissioner

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Summary

Mrs T requested from the Scottish Ministers (the Ministers) information relating to how they had handled a complaint she had submitted. The Ministers failed to respond to this request. Following a review, in which the Ministers provided Mrs T with some information, but advised her that they were withholding the remainder of the information she had requested in terms of section 38(1)(a) of FOISA, as it comprised her own personal data, Mrs T remained dissatisfied and applied to the Commissioner for a decision.

Following an investigation, the Commissioner found that the Ministers had dealt with Mrs T's request for information in accordance with Part 1 of FOISA, by disclosing some information to Mrs T and by correctly withholding the remaining information she requested under section 38(1)(a) of FOISA, as it comprised her own personal data. He did not require the Ministers to take any action.

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)(e)(i) (Effect of exemptions) and 38(1)(a) and (5) (definitions of "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) sections 1(1) (Basic interpretative provisions) (definition of "personal data")

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 5 January 2011, Mrs T wrote to the Ministers requesting the names of the personnel who had 'fully investigated' a complaint she had made, the detailed background of investigations, findings and recommendations regarding her complaint and details of how decisions were made regarding her complaint.



2. Mrs T received no response to this request and, on 10 February 2011, she wrote to the Ministers, requesting a review of their handling of her request and asking to be provided with the information relating to a complaint.
3. Mrs T did not receive a response to her request for review and, on 15 March 2011, she wrote to the Commissioner, stating that she was dissatisfied with that failure and applying for a decision in terms of section 47(1) of FOISA.
4. Following the commencement on the Commissioner's investigation of this matter, the Ministers conducted a review and, on 5 May 2011, they notified Mrs T of the outcome of that review. The Ministers provided Mrs T with the name of the person who most recently handled her complaint (whilst acknowledging that, over the years, many individuals had responded to her correspondence), but they advised Mrs T that they were withholding all of the information that fell within the scope of the remainder of her request in terms of section 38(1)(a) of FOISA, as it was her own personal data.
5. The Ministers noted that section 7(1) of the Data Protection Act 1998 (DPA) gives individuals a right to access their own personal data, and, in accordance with this provision of the DPA, they were providing Mrs T with a copy of all of the records they held that were dealt with by the individual who investigated her complaint (i.e. the person named in response to her first request). The Ministers also acknowledged that while Mrs T's complaint was not handled in line with the Scottish Government's complaints procedures, their officials had gone to great lengths to address all of the points she had raised over the years and they would no longer consider matters which had already been addressed. The Ministers then gave Mrs T notice that they now considered her complaint to be closed.
6. On 21 May 2011, Mrs T wrote to the Commissioner, stating that she was dissatisfied with the outcome of the Minister's review and applying to the Commissioner for a decision in terms of section 47(1) of FOISA.
7. The application was validated by establishing that Mrs T 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.
8. The Commissioner subsequently issued a decision in relation to Ms Vesco's application of 5 May 2011 on 25 May 2011. In this decision (101/2011), the Commissioner found that the Ministers failed to comply with the timescales set out in section 10(1) and 21(1) of FOISA, but noted that the Ministers had taken steps to rectify these breaches by conducting a review and notifying Mrs T of this in their letter of 5 May 2011.
9. Given that these technical matters were addressed in the Commissioner's previous decision, his investigation and decision in this case relates only to the substantive matters raised in Mrs T's application of 21 May 2011.



Investigation

10. On 30 May 2011, the Ministers were notified in writing that an application had been received from Mrs T and were asked to provide the Commissioner with any information withheld from her. The Ministers responded with the information requested and the case was then allocated to an investigating officer.
11. The investigating officer subsequently contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA) and asking them to respond to specific questions. In particular, the Ministers were asked to justify their reliance on any provisions of FOISA they considered applicable to the information requested.
12. The Ministers responded to this letter on 7 July 2011.
13. The submissions and comments received from both Mrs T and the Ministers are considered, where relevant, in the Commissioner's analysis and findings below.

Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the withheld information and the submissions made to him by both Mrs T and the Ministers and is satisfied that no matter of relevance has been overlooked.

Names of personnel

15. Mrs T asked for the names of the personnel who had fully investigated her complaint.
16. In its review outcome, the Ministers acknowledged that, since 2000, a number of their officials had attempted to resolve the matters raised by Mrs T, but most recently her complaint had been handled by one individual, and it provided her with the name of that individual.
17. In her application, Mrs T indicated that she was unhappy with the provision of one name and noted that she wanted the names of all of the individuals who had 'fully investigated' her complaint.
18. The Ministers have argued that the individual whose name they disclosed was the official who had thoroughly investigated Mrs T's complaints, and that he was also the most senior member of staff with knowledge of the specific issues Mrs T had complained about. The Ministers submitted that, although their three step complaints procedure was not undertaken in Mrs T's case, they had communicated their report into her complaints via correspondence written by the official whose name they had disclosed.



19. The Commissioner acknowledges that Mrs T has been in correspondence with the Ministers for many years and accepts that there will have been many officials who may have responded to correspondence from her in that time. However, the Commissioner is satisfied that the individual who fully investigated her complaint on behalf of the Ministers was the individual whose name was disclosed to her in the Ministers' review outcome, and as such he is satisfied that the Ministers have complied with Part 1 of FOISA in relation to Mrs T's first request.

Conduct of the investigation, etc.

20. Section 38(1)(a) of FOISA contains an absolute exemption in relation to personal data of which the applicant is the data subject. The fact that it is absolute means that it is not subject to the public interest test set out in section 2(1) of FOISA.
21. This exemption exists under FOISA because individuals have a separate right to make a request for their own personal data (commonly known as a "subject access request") under section 7 of the DPA. This ensures that such information is disclosed to the data subject (rather than to the world at large, which is the effect of disclosure under FOISA) under a regime designed for such purposes. It is not one of the purposes of FOISA to give the data subject a more extensive right of access to their own personal data than they would enjoy under the regime primarily governing the processing of that data, even if the applicant might wish that to be the case.
22. Personal data are defined in section 1(1) of the DPA as data which relate to a living individual who can be identified a) from those data, or b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller (the full definition is set out in the Appendix). In interpreting "personal data", the Commissioner has had regard to the judgment of the House of Lords in the case of *Common Services Agency v Scottish Information Commissioner* [2008] 1 WLR 1550.
23. Mrs T sought information regarding how the Ministers had handled a complaint she had submitted. The Ministers asserted that it followed that this was obviously a request for Mrs T's own personal data, which was exempt under section 38(1)(a) of FOISA. While the Commissioner recognises that it will not always be the case that all information about the handling of a complaint will be the complainer's personal data (see, for example, *Durant v FSA* [2003] EWCA Civ 1746), having viewed the information in this case, he is satisfied that all of the information relates to Mrs T and is her own personal data.
24. The Commissioner has therefore concluded that the Ministers were correct to withhold the information requested by Mrs T under section 38(1)(a) of FOISA.
25. As noted above, the exemption in section 38(1)(a) is an absolute one and the Commissioner is therefore not required (or entitled) to go on to consider whether the public interest lies in the information being disclosed or withheld. The fact that the information is the applicant's personal data means that it is exempt, and if that is the case the Commissioner must (even where the applicant has expressed a clear wish that disclosure should be under FOISA) accept that it should be withheld in response to a request under FOISA.



26. The Commissioner notes that, while the Ministers have withheld information falling under the scope of this part of Mrs T's request in terms of section 38(1)(a) of FOISA, they have released the same information to her under section 7(1) of the DPA.
27. The Commissioner acknowledges that Mrs T is dissatisfied with the information disclosed under the DPA by the Ministers, but it is not within his remit to examine whether a Scottish public authority has fully complied with its responsibilities under the DPA; that is the role of the Information Commissioner's Office (ICO).
28. The Commissioner notes that, in her correspondence, Mrs T intimated that she wished to appeal to the Scottish Public Services Ombudsman (SPSO) about the Scottish Government's handling of her complaint, but was unable to do so as she had been denied access to the Scottish Government's three step complaints procedure.
29. The Commissioner also acknowledges these concerns, but it is not within his remit to require or compel a Scottish public authority to handle a complaint in a specific way; that is the role of the SPSO.
30. The Commissioner can only consider whether an authority has complied with its obligations under FOISA, and in this case he finds that the Ministers have done so.

DECISION

The Commissioner finds that the Scottish Ministers complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by Mrs T.

Appeal

Should either Mrs T or the Scottish Ministers 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 Enforcement
20 July 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 –

...

- (e) in subsection (1) of section 38 –

- (i) paragraphs (a), (c) and (d); and

...

38 Personal information

- (1) Information is exempt information if it constitutes-

- (a) personal data of which the applicant is the data subject;

...



(5) In this section-

...

"data subject" and "personal data" have the meanings respectively assigned to those terms by section 1(1) of that Act;

...

Data Protection Act 1998

1 Basic interpretative provisions

(1) In this Act, unless the context otherwise requires –

...

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

...