

Decision Notice



Decision 069/2012 Dr Charles Saunders and the Scottish Ministers

Responses to Health Protection Stocktake Interim Report

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Summary

Dr Saunders asked the Scottish Ministers (the Ministers) to provide the information from all responses received to the Health Protection Stocktake interim report. The Ministers advised that they intended to publish the information within twelve weeks and applied the exemption in section 27(1) of FOISA. Following a review, the Ministers upheld their decision. Dr Saunders remained dissatisfied and applied to the Commissioner for a decision.

The Ministers then published most of the responses but decided that six should be withheld under section 38(1)(b) of FOISA as the consultees had not given permission for their responses to be published.

During the investigation, the Ministers published the six remaining responses. Dr Saunders asked the Commissioner to determine whether the Ministers' previous decisions to withhold first all, then some, of the information in the consultation responses was in compliance with FOISA. The Commissioner found that the Ministers had wrongly withheld information under section 27(1) and section 38(1)(b) of FOISA. As Dr Saunders had received the information, the Commissioner did not require the Ministers to take any further steps in relation to this matter.

Relevant statutory provisions and other sources

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (6) (General entitlement); 2(1)(b) (Effect of exemptions); 27(1) (Information intended for future publication); 38(1)(b), (2)(a)(i) and (b) and (5) (definitions of "the data protection principles", "data subject" and "personal data") (Personal information)

Data Protection Act 1998 (the DPA) section 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.

All references in this decision to "the Commissioner" are to Margaret Keyse, who has been appointed by the Scottish Parliamentary Corporate Body to discharge the functions of the Commissioner under section 42(8) of FOISA.



Background

1. On 28 October 2011, Dr Saunders wrote to the Ministers, asking whether the responses to the Health Protection Stocktake interim report (the Interim Stocktake report) were available to see. On 31 October 2011, the Ministers advised that, as the consultation was not a formal one, they did not believe the respondents had been asked for their permission to publish the responses; however, the Ministers agreed that the responses should be published on the Scottish Government website after respondents' permission had been sought.
2. On 1 November 2011, Dr Saunders made an information request to the Ministers for "all the responses received to the Interim Stocktake report".
3. The Ministers responded on the same day. They advised that the information requested by Dr Saunders was exempt from disclosure under section 27(1) of FOISA, as they had already taken the view that the information should be published, and intended to do so within twelve weeks. The Ministers went on to explain why they considered that the public interest in applying the exemption outweighed any public interest in disclosure.
4. On 16 November 2011, Dr Saunders asked for a review of the Ministers' response. He took the view that it was unreasonable to hold a further consultation on new Health Protection proposals when those who had commented on the original consultation had not had the opportunity to see the comments from the other respondents.
5. On 25 November 2011, Dr Saunders received an email (copied to many other health care professionals) from the Chief Medical Officer. He was advised that the consultation had been informal and therefore was not required to follow formal Scottish Government procedures; however, if respondents agreed, their responses would be published. If any respondent had reservations about publication, they would be given the opportunity to anonymise their response. The email also referred to the recent circulation of a paper which "gives a flavour of the key issues".
6. On 5 December 2011, the Ministers issued their response to Dr Saunders' request for review. The Ministers upheld their decision to withhold the information in the consultation responses under section 27(1) of FOISA.
7. Dr Saunders remained dissatisfied with the Ministers' response. On 13 December 2011, he applied for a decision from the Commissioner, in terms of section 47(1) of FOISA.
8. The application was validated by establishing that Dr Saunders had made a request for information to a Scottish public authority and had applied to the Commissioner for a decision only after the authority had been asked to review its response to that request.



Investigation

9. On 21 December 2011, the Ministers were notified in writing that an application had been received from Dr Saunders and asked to provide the Commissioner with any information withheld from him. On 10 January 2012, the Ministers published all but six of the responses which were covered by Dr Saunders' request. On 23 January 2012, the Ministers provided the Commissioner with copies of the six remaining responses, indicating that the respondents had withheld permission to publish. The case was then allocated to an investigating officer.
10. On 2 February 2012, the investigating officer contacted the Ministers and invited them to provide any comments they wished to make on the application, as required by section 49(3)(a) of FOISA. The Ministers were asked to:
 - justify the decision to withhold the information under section 27(1);
 - advise whether the Ministers wished to apply any exemption in FOISA to all or any of the information in the six responses which continued to be withheld;
 - explain why the information in the six withheld responses was more sensitive than the information published on 10 January 2012;
 - comment on the extent to which the decision to withhold responses to the consultation on the Interim Report was in line with the Scottish Government's Consultation Good Practice Guide.¹
 - provide any additional arguments or information which would support the decision to withhold the information.
11. On 22 February 2012, the Ministers advised that the remaining six responses had been published. Dr Saunders subsequently confirmed that he still required a decision on whether the Ministers had complied with Part 1 of FOISA in dealing with his request.
12. The Ministers then provided a full submission on Dr Saunders' application to the Commissioner (19 March 2012). They confirmed that the information had initially been withheld under section 27(1) of FOISA, and that information from six responses had been withheld under section 38(1)(b) of FOISA after the respondents had withheld permission to publish.
13. The relevant submissions received from both the Ministers and Dr Saunders will be considered fully in the Commissioner's analysis and findings below.

¹ <http://www.scotland.gov.uk/Resource/Doc/160377/0079069.pdf>



Commissioner's analysis and findings

14. In coming to a decision on this matter, the Commissioner has considered all of the submissions made to her by Dr Saunders and by the Ministers and is satisfied that no matter of relevance has been overlooked.

Section 27(1) Information intended for future publication

15. Section 27(1) provides that information is exempt from disclosure where the following tests are met:
- the information is held with a view to its being published, by a Scottish public authority or any other person, at a date not later than twelve weeks after that on which the request for the information is made;
 - when the request is made, the information is already being held with that view; and
 - it is reasonable in all the circumstances that the information be withheld from disclosure until the intended publication date.
16. Section 27(1) recognises that where it is intended to make information available, public authorities should, within reason, have space to be able to determine their own publication timetables and deal with the necessary preparation, administration and context of publication. The exemption is subject to the public interest test laid down by section 2(1)(b) of FOISA.
17. Under this exemption, information intended for publication within twelve weeks is exempt from disclosure where it is "reasonable in all the circumstances" to withhold the information until the planned publication date. The authority should be able to demonstrate that a publication timetable has already been decided and that it is not simply delaying the release of information for twelve weeks.
18. The Commissioner is aware that all the information covered by Dr Saunders' request was published by the Ministers within twelve weeks of the date of his request. However, in order for section 27(1) to be upheld, the Commissioner must consider whether all of the tests required by this exemption can be met in the circumstances of this case.
19. The first requirement of section 27(1) is that the information in question must be held "with a view to its being published" within twelve weeks. In this case, it seems that Dr Saunders' email of 28 October 2011 prompted the Ministers to publish the consultation responses. If this email had been treated as an information request in terms of section 1 of FOISA, the Ministers would not have been able to claim that the information was being held with a view to publication at the time of the request. However, although the email of 28 October 2011 is arguably a valid request for the purposes of section 1 of FOISA, the Commissioner notes that it was not regarded as such by Dr Saunders, who submitted what he described as a "formal FOI request" for the same information a few days later.



20. The Commissioner accepts that, at the time of Dr Saunders' request of 1 November 2011, the Ministers had expressed a willingness to publish the responses and were taking steps towards this. It is evident that the Ministers did not, at this point, have a specific publication date in mind, but in the circumstances of the case the Commissioner is prepared to accept that the Ministers aimed to publish the information within twelve weeks of the date of Dr Saunders' request.
21. However, the Commissioner still has some difficulty in accepting that all the information covered by Dr Saunders' request was held with a view to publication at the time of the request. The email he received on 31 October 2011 made it clear that publication would only take place once the Ministers had sought permission from the respondents. The email sent by the Chief Medical Officer on 25 November 2011 again indicated that publication of the information in full would only be possible with the respondents' consent: if any of the respondents had reservations, they would be given the opportunity to anonymise their responses.
22. The Commissioner accepts that Ministers acted in good faith in stating that they aimed to publish information from the responses within twelve weeks, but she is not persuaded that the Ministers considered it to be within their power to fulfil this aspiration unconditionally, as full publication of the information appears to have been dependent upon the respondents giving their permission. Six of the responses were initially withheld when the rest were published, because the respondents had withheld consent.
23. In these circumstances, the Commissioner cannot accept that the Ministers were justified in applying section 27(1) to the withheld information. There is nothing in the text of section 27(1) or the record of Parliamentary discussion² about this provision to support the view that the intention to publish (required for this exemption to apply) can be conditional. Although the Ministers considered it appropriate (and indeed wished) to publish the responses, they could not be sure, at the time of Dr Saunders' request, that they would obtain the consents they believed necessary for all the information to be published.
24. The Commissioner therefore finds that the exemption in section 27(1) of FOISA was wrongly applied to the information requested by Dr Saunders, as the Ministers did not hold all the information with a definite view to publication, but rather could envisage circumstances in which some or all of the information might be withheld and not published.

Section 38(1)(b) Personal information

25. The Ministers initially withheld from publication six responses to the Interim Stocktake report where the respondents had not provided consent for this to happen.

² Scottish Parliament Justice 1 Committee Tuesday 12 February 2002 (Afternoon): Freedom of Information (Scotland) Bill: Stage 2



26. The Ministers considered the information in the unpublished responses to be personal data as defined by section 1(1) of the DPA, and argued that disclosure of this information without the data subjects' consent would breach the first data protection principle. In the course of the investigation, therefore, the Ministers relied upon section 38(1)(b) of FOISA in relation to this information. Section 38(1)(b) of FOISA, read in conjunction with section 38(2)(a)(i) or (as appropriate) section 38(2)(b), exempts information if it is personal data and its disclosure to a member of the public (otherwise than under FOISA) would breach any of the data protection principles set out in Schedule 1 to the DPA.
27. The exemption in section 38(1)(b) is an absolute exemption, and is therefore not subject to the public interest test laid down by section 2(1)(b) of FOISA.

Is the information personal data?

28. Personal data is 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). The Ministers argued that the first part of this definition was relevant in this case.
29. The Commissioner accepts that one of the responses (document 1) expresses the views of an identifiable, living individual. It is also clear from the response, however, that the views are presented by the individual in their professional capacity as a senior practitioner in the relevant authority. There is nothing in the terms of the response to suggest otherwise. It appears to the Commissioner to represent an objective, if robust, professional appraisal of aspects of the Interim Stocktake report. It does not appear to tell the reader anything significant about the writer as an individual, nor does it appear reasonable to conclude that it could be used in any meaningful way to inform actions or decisions in relation to that individual.
30. The Ministers have not expanded on why this information should be considered to relate to the individual concerned and, in the circumstances, the Commissioner can identify no reasonable basis for concluding that it does. Consequently, she does not accept that the information should be considered to be the personal data of the individual concerned (or, for that matter, any other living individual).
31. All of the other withheld responses appear to represent the collective views of the respective responding organisations. While written and submitted by identifiable individuals, the Commissioner can find no basis, on any reasonable interpretation, for concluding that the information in these responses "relates to" those individuals. Again, the Ministers have provided no reasons for concluding that this should be the case. In the circumstances, the Commissioner cannot find that the information in these responses comprises the personal data of any individual.
32. In all the circumstances, therefore, the Commissioner does not accept that any of the information to which the Ministers applied the exemptions in section 38(1)(b) of FOISA could properly be considered to be the personal data of any individual. Consequently, she finds that the Ministers were not entitled to apply the exemption to that information.



Conclusion

33. The Commissioner finds that the Ministers were not entitled to withhold the information requested by Dr Saunders under section 27(1) of FOISA, and were wrong to withhold elements of the information under section 38(1)(b) of FOISA after partial publication had taken place.
34. As Dr Saunders has now received all the information covered by his request, the Commissioner does not require the Ministers to take any further action in relation to this matter.

DECISION

The Commissioner finds that the Scottish Ministers failed to comply with Part 1 (and in particular section 1(1)) of the Freedom of Information (Scotland) Act 2002 (FOISA). The Ministers were not entitled to withhold information under section 27(1) or section 38(1)(b) of FOISA.

Given that Dr Saunders has now received all of the information covered by his request, the Commissioner does not require the Ministers to take any action in relation to these failures.

Appeal

Should either Dr Saunders 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.

Margaret Keyse
Acting Scottish Information Commissioner
12 April 2012



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 –

...

- (b) in all the circumstances of the case, the public interest in disclosing the information is not outweighed by that in maintaining the exemption.

...

27 Information intended for future publication

- (1) Information is exempt information if-

- (a) it is held with a view to its being published by-
- (i) a Scottish public authority; or
 - (ii) any other person,

at a date not later than twelve weeks after that on which the request for the information is made;

- (b) when that request is made the information is already being held with that view; and
- (c) it is reasonable in all the circumstances that the information be withheld from disclosure until such date as is mentioned in paragraph (a).



...

38 Personal information

(1) Information is exempt information if it constitutes-

...

(b) personal data and either the condition mentioned in subsection (2) (the "first condition") or that mentioned in subsection (3) (the "second condition") is satisfied;

...

(2) The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998 (c.29), that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

(i) any of the data protection principles; or

...

(b) in any other case, that such disclosure would contravene any of the data protection principles if the exemptions in section 33A(1) of that Act (which relate to manual data held) were disregarded.

...

(5) In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to that Act, as read subject to Part II of that Schedule and to section 27(1) of that Act;

"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

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;

...