

Decision Notice 094/2020

Bankruptcy Restriction Orders

Applicant: The Applicant

Public authority: Accountant in Bankruptcy

Case Ref: 201901926



Scottish Information
Commissioner

Summary

The AiB was asked whether police classified evidence is used when constructing a Bankruptcy Restriction Order. The AiB stated that it did not hold the requested information.

Following investigation, the Commissioner accepted that the requested information was not held.

Relevant statutory provisions

Freedom of Information (Scotland) Act 2002 (FOISA) sections 1(1) and (4) (General entitlement); 17(1) (Notice that information is not held)

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. Under the Bankruptcy (Scotland) Act 1985, the Accountant in Bankruptcy (the AiB) had the power to grant a Bankruptcy Restriction Order (BRO).¹ A BRO can, for example, restrict how an undischarged bankrupt obtains credit or restrict their ability to act as a Director or manage a business. If the BRO is likely to be required for more than five years, the AiB can submit an application to a Sheriff Court for a BRO to be made.²
2. On 8 July 2019, the Applicant made a request for information to the AiB. The information requested was:
when constructing a BRO can the AiB use police classified evidence for the purposes of supporting their allegations, and can this classified evidence be included in a court submitted document before it is heard in the case it was originally ingathered for?
3. The AiB responded on 11 July 2019. It notified the Applicant that it did not hold the requested information, in line with section 17(1) of FOISA.
4. On 2 August 2019, the Applicant wrote to the AiB requesting a review of its decision on the basis that he considered that the information was held. The Applicant provided copies of documents he considered substantiated his position.
5. The AiB notified the Applicant of the outcome of its review on 23 August 2019. The AiB provided further explanation for its initial response and confirmed that the requested information was not held.
6. On 21 October 2019, the Applicant applied to the Commissioner for a decision in terms of section 47(1) of FOISA. The Applicant stated he was dissatisfied with the outcome of the AiB's review because he considered that the requested information was held.

¹ The Bankruptcy (Scotland) Act 1985 has been repealed and replaced by the Bankruptcy (Scotland) Act 2016.

² <https://www.aib.gov.uk/what-are-bankruptcy-restrictions>

Investigation

7. The application was accepted as valid. The Commissioner confirmed that the Applicant made a request for information to a Scottish public authority and asked the authority to review its response to that request before applying to him for a decision.
8. On 22 November 2019, the AiB was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
9. The AiB is an agency of the Scottish Ministers (the Ministers). In accordance with agreed arrangements, the investigating officer contacted the Ministers, giving them an opportunity to provide comments on the application (as required by section 49(3)(a) of FOISA). Any reference to submissions made by the AiB in this decision includes submissions made on its behalf by the Ministers.
10. The AiB responded to the questions raised regarding the searches it had conducted and provided submissions as to why it was satisfied that the requested information was not held.

Commissioner's analysis and findings

11. In coming to a decision on this matter, the Commissioner considered all of the relevant submissions, or parts of submissions, made to him by both the Applicant and the AiB. He is satisfied that no matter of relevance has been overlooked.
12. 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. The qualifications contained in section 1(6) are not applicable in this case.
13. The information to be given is that held by the authority at the time the request is received, as defined in section 1(4). This is not necessarily to be equated with information an applicant believes the authority should hold. If no such information is held by the authority, section 17(1) of FOISA requires it to give the applicant notice in writing to that effect.

The Applicant's submissions

14. The Applicant explained the background to his information request. To summarise, he believed that the AiB was in possession of information, including bank statements and "criminal evidence," that it had no right to obtain or use as the basis of a BRO.
15. The Applicant queried how, if the AiB had no internal guidelines or processes in place relating to the treatment of criminal evidence and BRO compilations, how it maintained the legal integrity of documents being produced in court, and how it maintained an accurate and truthful interpretation of what information it holds regarding criminal evidence versus non-criminal evidence.

The AiB's submissions

16. In its submissions to the Commissioner, the AiB confirmed its position that it held no information requested by the Applicant.

Searches

17. The AiB provided a copy of the results of the searches that it had undertaken prior to responding to the review request. It confirmed that it had searched its online records; its records management database, correspondence data, network drive, knowledge tracker and GDPR database. In addition, each document within the electronic case files associated with the Applicant's case was opened and read by the reviewer.
18. The AiB confirmed that relevant staff that had searched their email records for the requested information and stated that these individuals are the only current members of the AiB staff who have had recent and/or historic, involvement with the Applicant, and therefore the only members of staff likely to hold any information falling within scope of this request.
19. The AiB explained that the individual dealing with the request for review had a good knowledge of the information held in relation to this case and BRO as they had responded to a subject access request which required a full review of all of the information held. The AiB stated that no documents were identified at the time as being "police classified evidence", and no documents were withheld from the Applicant on this basis that they were "police classified evidence".
20. A senior manager, involved in the drafting of the original BRO Standard Operating Procedure (SOP) and Notes for Guidance when BROs were introduced, confirmed that the information requested by the Applicant was never considered or recorded in these documents.

Productions

21. The AiB responded during the investigation to a query raised by the Applicant in his application as to the source of certain productions that were used in constructing the BRO.
22. The AiB described the source of certain productions and explained that all productions submitted to court were relevant to demonstrate to the sheriff, in accordance with the Bankruptcy (Scotland) Act 1985, the behaviour on the part of the Applicant, and support the grounds for a BRO as presented in the application. The AiB noted that its BRO application and the supporting productions were approved by the AiB's solicitors, prior to the application being submitted, by them, to the Sheriff Court.
23. The AiB highlighted that the Applicant was present at the hearing and he made no reference to the BRO productions at the court hearing, and the Sheriff did not raise any concerns regarding the acceptability of the productions.

Procedures

24. The AiB submitted that it does not have a Memorandum of Understanding (MOU) with Police Scotland. However, it does not generally receive information from Police Scotland in relation to the administration of a bankruptcy or a BRO investigation.
25. During the investigation, the AiB was asked for and provided a copy of its standard policies and procedures that were in place at the time of the Applicant's BRO investigation and the current procedures that came into effect after the investigation.
26. The Commissioner notes that the AiB updated its SOP since the Applicant's case went to court. The updated version includes details of how to investigate a case that were not included in the previous version. However, the Commissioner is satisfied that there is nothing within the SOPs which refers to police classified evidence.

Criminal and non-criminal evidence

27. It was noted that the Applicant had stated that the AiB had informed him that it does not differentiate between criminal and non-criminal evidence. The AiB stated that it does not hold any record to this effect and the AiB staff do not deal with criminal evidence.

Police classified evidence

28. As part of its review response, the AiB stated that it could find no evidence that would identify the BRO productions as being “police classified evidence”, and that there is no record of the AiB having ever used “police classified evidence” in support of a BRO application.
29. The AiB explained that productions in support of the BRO application were obtained from sources in the course of the trustee and the AiB, carrying out their statutory functions. The trustee in a bankruptcy has the statutory functions of recovering, managing and realising the debtor’s estate, ascertaining the reasons for the debtor’s insolvency.
30. If the trustee identifies any behaviour that may warrant granting a BRO, the trustee shall report this to the AiB and supply the AiB with such information as the AiB considers necessary to enable it to discharge their statutory function of submitting a BRO application to court in line with the Bankruptcy (Scotland) Act 1985.

The Commissioner’s findings

31. The standard proof to determine whether a Scottish public authority holds information is the civil standard of the balance of probabilities. In determining where the balance lies, the Commissioner considers the scope, quality, thoroughness and results of the searches carried out by the public authority. He also considers, where appropriate, any reason offered by the public authority to explain why it does not hold the information. Ultimately the Commissioner's role is to determine what relevant information is actually held by the public authority (or was, at the time it received the request).
32. In reaching a finding in this case, the Commissioner must distinguish between what happened in the Applicant’s case and the matters that can be investigated under FOISA. Specifically in this decision, the question is whether the AiB holds any recorded information which states that it can use police classified evidence in constructing a BRO.
33. The Commissioner has considered the submissions provided by the AiB and is satisfied that the AiB has provided extensive and cogent arguments as to why the information is not held. He is also satisfied that the searches conducted were proportionate and appropriate and would, if the information existed, have located the information.
34. The Commissioner is satisfied, on balance of probabilities, that the AiB does not hold the requested information and that the AiB was correct to give the Applicant notice, in terms of section 17(1) of FOISA, that the information is not held.

Decision

The Commissioner finds that Accountant in Bankruptcy complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

Appeal

Should either the Applicant or the AiB 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.

Margaret Keyse
Head of Enforcement

20 August 2020

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.

...

- (4) The information to be given by the authority is that held by it at the time the request is received, except that, subject to subsection (5), any amendment or deletion which would have been made, regardless of the receipt of the request, between that time and the time it gives the information may be made before the information is given.

...

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.

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