

# Decision Notice 002/2021

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## **Name of judge and clerk of court in specified case**

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**Applicant: The Applicant**

**Public authority: Scottish Courts and Tribunals Service**

**Case Ref: 202001185**



## Summary

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The SCTS was asked for the name of the judge and clerk of court to be present in the court case of [ ] v The Human Embryology and Fertilisation Authority, to be heard on 30 November 2020.

The SCTS notified the Applicant that no information was held. The Commissioner investigated and accepted this response.

## Relevant statutory provisions

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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

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1. On 21 September 2020, the Applicant made a request for information to the Scottish Courts and Tribunals Service (the SCTS). The information requested was:  
*The name of the judge and clerk of court to be present in the court case [ ] v The Human Embryology and Fertilisation Authority to be heard on the 30<sup>th</sup> of November 2020. Please also disclose information that would detail if the case is to be heard in the Inner or Outer Court of the Court of Session.*
2. The SCTS responded on 28 September 2020 and notified the Applicant, in line with section 17 of FOISA, that it held no recorded information which would fulfil their request. The SCTS explained that there was no record of any court hearing for the named case at the Court of Session, and in any event, 30 November 2020 was a court holiday for the Court of Session.
3. On 29 September 2020, the Applicant wrote to the SCTS requesting a review of its decision, submitting that while there might not be a case by the exact title they had given, they understood a [ ] was seeking to appeal to the Court of Session or another court regarding the issue of being able to keep her transgender daughter's sperm (which was due for destruction by 30 November 2020). The Applicant believed the SCTS had the information, or some of the information, they were seeking.
4. The SCTS notified the Applicant of the outcome of its review on 5 October 2020. It upheld its response, confirming that there was no record of a hearing at the Court of Session for the case named by the Applicant. The SCTS explained that further searches had been carried out of its records and that no action had been registered in the name of [ ] or against the Human Embryology and Fertilisation Authority or against any Scottish Health Boards regarding the matter referred to by the Applicant.
5. On 12 October 2020, the Applicant wrote to the Commissioner, applying for a decision in terms of section 47(1) of FOISA. The Applicant was dissatisfied with the outcome of the SCTS's review because they did not believe the SCTS had carried out an accurate search for information covered by the request. The Applicant referred to an article in the press which alluded to a case relating to this subject being heard at the Court of Session or another Scottish Court on 30 November 2020.

## Investigation

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6. 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.
7. On 19 October 2020, the SCTS was notified in writing that the Applicant had made a valid application and the case was allocated to an investigating officer.
8. Section 49(3)(a) of FOISA requires the Commissioner to give public authorities an opportunity to provide comments on an application. The SCTS was invited to comment on this application and to answer specific questions, with particular reference to the steps it had taken to identify and locate the information requested. The SCTS was also invited to comment on the press article referred to by the Applicant, which appeared to suggest that a court case was set down for 30 November 2020 for the case referred to in the application.

## Commissioner's analysis and findings

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9. In coming to a decision on this matter, the Commissioner considered all of the withheld information and the relevant submissions, or parts of submissions, made to him by both the Applicant and the SCTS. He is satisfied that no matter of relevance has been overlooked.

### Information held by the SCTS

10. 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.
11. 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.
12. The Commissioner notes that the Applicant is of the view that the SCTS should hold the requested information.
13. In its submissions, the SCTS confirmed that 30 November 2020 (St Andrew's Day) is a public holiday and the Court of Session, along with all other Scottish Courts, is closed. The SCTS provided a link to a list of public and privilege holidays taken by the Courts to evidence this.
14. The SCTS set out the nature of the searches it undertook at each stage of responding to the Applicant's request, to determine if relevant, recorded information was held. This included the keywords used by the SCTS to interrogate its electronic systems. The SCTS also outlined the searches that were undertaken of its manual records.
15. The SCTS explained that it would only hold information covered by the Applicant's request in the event that a case was registered and thereafter allocated to a judge for hearing. The SCTS noted that it had a legal duty to hold information on the name and allocated case reference number of cases registered, but until a case was registered there would be no information for it to hold. It also commented that it was not involved in any discussions between potential parties prior to the raising of any court action.

16. In responding to the Applicant's view that the press article highlighted by them suggested that a court action was set down for 30 November 2020 for the case in question, the SCTS commented that the article appeared to speak to legal action in speculative terms: again, it confirmed that no courts would be sitting on 30 November 2020.
17. The SCTS provided the Commissioner with a link to another press article dated 22 November 2020, which appeared to suggest that no legal action had been lodged as yet.
18. The Applicant was informed of the content of this press article and in turn highlighted another article, which appeared in one part to suggest that the Court granted an extension until 12 January 2021 to allow [ ] to obtain further information. In a later part of the article, however, it suggests that the decision to agree an extension came from the NHS. In any case, the Applicant remained dissatisfied as they were of the view that the SCTS had failed to explain why other news articles reported a court case on 30 November 2020 for the matter in question.
19. The standard of 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).
20. Having considered all of the relevant submissions and the terms of the request, the Commissioner accepts that the SCTS carried out thorough, adequate and proportionate searches to determine if it held any relevant, recorded information falling within scope of the Applicant's request. The Commissioner acknowledges that no courts in Scotland were sitting on 30 November 2020 as it is a public holiday recognised by the SCTS. As such, there were no cases calling in the courts on that date.
21. The Commissioner has read all of the press articles on this matter that have been brought to his attention and appreciates that some articles may suggest that a court case was set down for 30 November 2020 in relation to this matter. However, as mentioned above, he has to make a decision on what recorded information is actually held by the SCTS in respect of this matter. The SCTS holds the official court records and he cannot comment on how the media reflect the circumstances of a particular situation.
22. Given that the Commissioner is satisfied with the explanations and submissions provided by the SCTS, he finds that the SCTS was correct to notify the Applicant, in line with section 17(1) of FOISA, that it held no information falling within scope of their request.

## Decision

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The Commissioner finds that the Scottish Courts and Tribunals Service complied with Part 1 of the Freedom of Information (Scotland) Act 2002 in responding to the information request made by the Applicant.

## **Appeal**

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Should either the Applicant or the SCTS 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**

**7 January 2021**

## Appendix 1: Relevant statutory provisions

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### 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.

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- (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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